

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS. CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8

9 Transcript of Motion Proceedings before
10 The Honorable James O. Browning, United States
District Judge, Las Cruces, Dona County,
New Mexico, commencing on March 12, 2018.

11

12 For the Government: Ms. Maria Armijo; Mr. Randy
Castellano; Mr. Matthew Beck

13

14

15 For the Trial 1 Defendants: Mr. Brock Benjamin, Ms.
Cori Harbour-Valdez; Mr. Patrick Burke; Mr. Jim
Castle; Mr. Robert Cooper; Mr. James Lahann; Mr. Joe
Shattuck; Mr. John Granberg; Mr. Eduardo Solis; Mr.
Billy Blackburn; Mr. Donovan Roberts; Ms. Lisa
Torraco; Angela Arellanes

16

17 For the Trial 1 Defendants: Ms. Theresa Duncan; Ms.
Amy Jacks; Mr. Richard Jewkes; Ms. Carey Bhalla; Mr.
William Maynard; Ms. Justine Fox-Young; Mr. Ryan
Villa

18

(Trial 1 attorneys left after verdict was returned.)

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1 THE COURT: All right. Good morning,
2 everyone. I appreciate everybody being here and on
3 time and ready to go.

4 The Court will call United States of
5 America versus Angel DeLeon, Criminal 15-4268 JB.
6 I'll call roll here a little bit according to the way
7 I've organized things to start working on the hearing
8 for the second trial. And so I'll call the
9 defendants that are awaiting the verdict in the Trial
10 1 at the end of this.

11 But let's start with Joe Lawrence Gallegos,
12 Defendant Joe Lawrence Gallegos.

13 MR. BENJAMIN: Good morning, Your Honor.
14 Brock Benjamin on behalf of Mr. Gallegos, who is
15 ready.

16 THE COURT: All right. Mr. Benjamin, good
17 morning to you. Is Mr. Sindel with you today?

18 MR. BENJAMIN: He is not, Your Honor.

19 THE COURT: All right. So it's just you
20 today. All right. Mr. Benjamin, good morning to
21 you.

22 And for Defendant Edward Troup.

23 MS. HARBOUR-VALDEZ: Good morning, Your
24 Honor. Cori Harbour-Valdez and Pat Burke on behalf
25 of Edward Troup.

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1 THE COURT: All right. Ms. Harbour-Valdez,
2 good morning to you. Mr. Burke, good morning to you.
3 And Mr. Troup, good morning to you.

4 THE DEFENDANT: Good morning, Your Honor.

5 THE COURT: Mr. Gallegos, good morning to
6 you. I didn't say good morning to you.

7 THE DEFENDANT: Good morning.

8 THE COURT: I was looking for Mr. Sindel
9 and didn't say hello to you.

10 All right. And for Defendant Billy Garcia.

11 MR. COOPER: Good morning, Your Honor. Bob
12 Cooper and Jim Castle on behalf of Mr. Garcia. And
13 he is present today.

14 THE COURT: All right. Mr. Cooper, Mr.
15 Castle, Mr. Garcia, good morning to you.

16 THE DEFENDANT: Good morning, Your Honor.

17 THE COURT: For Defendant Allen Patterson.

18 MR. SHATTUCK: Good morning, Your Honor.
19 Joe Shattuck for Mr. Patterson, who is present as
20 well. And Mr. Lahann will be here shortly.

21 THE COURT: All right. Mr. Shattuck, good
22 morning to you. Mr. Patterson, good morning to you.

23 THE DEFENDANT: Good morning, Your Honor.

24 THE COURT: And for Defendant Christopher
25 Chavez.

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1 MR. GRANBERG: Good morning, Your Honor.

2 John Granberg and Eduardo Solis for Mr. Chavez.

3 THE COURT: All right. Mr. Granberg, Mr.

4 Solis, good morning to you.

5 MR. SOLIS: I've only been on the case for
6 two days. I'm here to assist Mr. Granberg with
7 whatever he instructs me to do.

8 THE COURT: All right. Glad to have you
9 here.

10 And for defendant Arturo Arnulfo Garcia.

11 MR. BLACKBURN: Billy Blackburn on behalf
12 of Mr. Garcia, who is present, and we're ready, Your
13 Honor.

14 THE COURT: All right.

15 MR. BLACKBURN: Mr. Davidson will not be
16 joining us this week.

17 THE COURT: Mr. Blackburn, good morning to
18 you. Mr. Garcia, good morning to you.

19 THE DEFENDANT: Good morning.

20 THE COURT: And for Defendant Andrew
21 Gallegos.

22 MR. ROBERTS: Good morning, Your Honor.

23 Donovan Roberts and Lisa Torraco for Andrew Gallegos.
24 We're all present and ready to proceed.

25 THE COURT: All right. Mr. Roberts, Ms.

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1 Torraco, Mr. Gallegos, good morning to you.

2 And for Defendant Shauna Gutierrez.

3 MS. ARELLANES: Angela Arellanes with Ms.

4 Gutierrez, who appears in person.

5 THE COURT: All right. Ms. Arellanes, good
6 morning to you. Ms. Gutierrez, good morning to you.

7 THE DEFENDANT: Good morning.

8 THE COURT: And then for Defendant Daniel
9 Sanchez.

10 MS. JACKS: Good morning, Your Honor. Amy
11 Jacks and Richard Jewkes for Mr. Sanchez.

12 THE COURT: All right. Ms. Jacks,
13 Mr. Jewkes, Mr. Sanchez, good morning to you.

14 And for Mr. Baca.

15 MS. DUNCAN: Good morning, Your Honor.
16 Theresa Duncan appearing on behalf of Mr. Baca. And
17 Mr. Lowry won't be with us this week.

18 THE COURT: All right. Ms. Duncan, Mr.
19 Baca, good morning to you.

20 THE DEFENDANT: Good morning, Your Honor.

21 THE COURT: And for Mr. Herrera.

22 MR. MAYNARD: Good morning, Your Honor.
23 Bill Maynard for Mr. Herrera.

24 THE COURT: All right. Mr. Maynard, good
25 morning to you. Mr. Herrera, good morning to you.

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1 And for Mr. Perez.

2 MS. FOX-YOUNG: Good morning, Your Honor.

3 Justine Fox-Young for Mr. Perez. And Ryan Villa is
4 on his way. I think we'll see him about 10:00 this
5 morning.

6 THE COURT: All right. Ms. Fox-Young, good
7 morning to you. Mr. Perez, good morning to you.

8 All right. So I have been told that this
9 is also a pretrial conference, so what I propose to
10 do is to start with some of the details of the
11 pretrial conference, and then we will fit the motions
12 in. Ms. Wild has kept me posted with how y'all want
13 to have them argued. I had an earlier list last
14 week. I have a revised list. Assuming the revised
15 list is how you want to argue it, then we'll proceed
16 that way.

17 Let me introduce you to Carol Bevel. Many
18 of you who may know her. She's been Judge Christina
19 Armijo's courtroom deputy for a long time. And, of
20 course, with the Chief taking -- Judge Armijo taking
21 senior status, she's taking nothing but civil cases.
22 She's not taking any criminal cases. So Ms. Bevel's
23 courtroom duties go way down, so she's been moved
24 over to me. So those of you who have met Michelle
25 Behning, she's been moved to the magistrate judge's

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1 division. And I'm lucky to have such an experienced
2 CRD starting work for me today. So today is her
3 first day.

4 And as I understand things, JoAnn
5 Standridge is going to work with me until we receive
6 a verdict, or some resolution of the first trial, and
7 then she'll be leaving me. So Ms. Bevel and I will
8 be working with you on the second trial. So both of
9 them will be here for at least a while.

10 All right. What I'm going to tell the jury
11 on April 9 is that this is a six- to eight-week
12 trial. We're in the seventh week of the Trial 1. So
13 I think everybody estimated fairly well. So I'm
14 going to tell them six to eight weeks on the second
15 one, to see if there is any problems with their
16 schedules. As you know, that is what we also told
17 them both in the cover letter and in the
18 questionnaire itself. So unless somebody sees some
19 reason to do something different on April 9, I would
20 propose that I use that six to eight weeks.

21 Does that sound good from the Government's
22 standpoint?

23 MS. ARMIJO: Yes, Your Honor.

24 THE COURT: Any of the second trial
25 defendants think anything else needs to be used, as

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1 we talk to the jury? All right. Not hearing any,
2 then I will plan on telling them six to eight weeks
3 for that trial.

4 Courtroom: I'm still a little undecided as
5 to where we're going to have this trial. Of course
6 on the questionnaire we have indicated it's here.
7 And I think presumption-wise, the case was indicted
8 down here, I did the first trial down here. We are
9 looking at some rather large numbers. And so I'm
10 trying to make it work. There was some discussion of
11 putting it into the Sierra Blanca room. And I'm not
12 as familiar with the courthouse here as some of y'all
13 may be, but I think that's the room right next door.
14 It's a little larger, but it's only six feet larger.
15 So it doesn't give me a lot more room. It doesn't
16 give me the room that I have up in say, the Rio
17 Grande. I think we've all been in the Rio Grande up
18 in Albuquerque.

19 I can't probably do the nice tables. I
20 hope the defendants would agree that this was a nice
21 layout for them during the trial. We worked very
22 hard to make it one that worked as far as optics from
23 the jury standpoint, from the voir dire standpoint,
24 and also for the comfort of the defendants and their
25 counsel and the paralegals. I probably can't do that

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1 with these sort of numbers that we're looking at. So
2 I'm still undecided about location.

3 Ms. Jacks has sort of educated us a little
4 bit on her experience around the country. And we may
5 pick up one of her tips as far as building two
6 tables. And so, what I understand Ms. Wild is
7 thinking about doing is putting a table -- just one
8 long table here for the counsel, and then behind that
9 a table for the defendants, and so you'll turn
10 around. But I don't have anything better, and
11 Ms. Jacks says it seems to work. So that's kind of
12 what I'm looking at doing. And that's probably going
13 to be whether it's in this room or Rio Grande or
14 Sierra Blanca. I don't see any other way to do any
15 sort of seating. So probably that means paralegals
16 and other people that may sit with you may not be
17 able to sit with you. We can probably figure out
18 places that they can go. But right at the moment,
19 the courtroom is still open, the location is still
20 open, and the seating arrangement is probably going
21 to move toward two long tables that I will have to
22 build for this trial.

23 So I don't have a lot more to say on that.
24 I will still be working with Ms. Wild, and I'll keep
25 you posted. But I'm concerned about the numbers that

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1 we're looking at, that Las Cruces may just not be
2 able to accommodate a trial -- I guess there is eight
3 of you for the second trial. So we'll just have to
4 keep an eye on that.

5 As in the first trial, I had closings
6 before the instructions. But y'all may want to do
7 something different. Does the Government want
8 closings before instructions or after instructions?

9 MS. ARMIJO: After.

10 THE COURT: You want closings after. Most
11 lawyers want that. Do I hear anybody wanting
12 something different? Most people want to get the
13 judge out of the way so they can talk to the jury.

14 I haven't talked to Ms. Wild. I don't know
15 if any of this has been filed or anything like this,
16 but it seems to me that we've worked through a lot of
17 details on the elements of the offense. And so
18 normally what I would do is request that everybody
19 provide for me so I can put in the preliminary
20 instruction the elements of the offense. What I
21 would propose is other than the name changing, go
22 ahead and use for the preliminary instruction what I
23 used in the first trial, which for those of you who
24 were not present for some of the portions, the jury
25 later asked us for a list of names and counts so that

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1 they could begin to match it. Because it was a
2 little hard for them to keep that straight. So we
3 ended up early in the trial giving them a copy of the
4 preliminary instruction. And that's not something
5 I've normally done, but we might give it some
6 thought. So I'm not sure I need elements of the
7 offense. If I can have Ms. Bevel hand out to you a
8 copy of the preliminary instruction we gave in the
9 first trial and give it to the eight lawyers. And
10 then I can also just see if anybody has any problem.
11 But other than changing the names, I would propose to
12 use those elements to give the jury. And then just
13 think about it. What would you think about giving
14 them the preliminary instruction right then, after
15 they -- after I read it, they see it on the Elmo, we
16 just hand them an instruction so that they can begin
17 to keep track a little bit of the defendants and the
18 counts. What would the Government think about that
19 sort of proposal?

20 MS. ARMIJO: Your Honor, that's a good idea
21 given the confusion in the first trial. And this has
22 more defendants, four murders, and some different
23 incidents. And as you know, we had a lot fewer in
24 the first one.

25 THE COURT: Okay. What would the

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1 defendants think about that? Would that work for
2 y'all? Mr. Cooper?

3 MR. COOPER: Your Honor, I haven't looked
4 at that preliminary instruction in a while.

5 THE COURT: Okay. We'll get you a copy and
6 we'll pass it out. And then you can take a look at
7 it. It's based upon the Tenth Circuit pattern
8 instruction, and then -- it doesn't go into all the
9 sort of -- I know this is VICAR -- I'll call them
10 racketeering acts -- it doesn't go into the elements
11 that have to be proved for murder and those things.
12 It just simply has the jury focus on the VICAR
13 elements. And then it lists for them the counts, but
14 it doesn't define the counts. What do you think
15 about that?

16 MR. COOPER: I'd like to just sit tight on
17 it.

18 THE COURT: Sure.

19 MR. COOPER: Look at it, and talk with
20 co-counsel before we make the decision.

21 THE COURT: All right. Why don't we do
22 this: I'll go ahead and preliminarily sort of rule
23 that what I'm going to do is give something that's
24 pretty close to what was in the first trial. And
25 then let's plan on passing it out to the jury. And I

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1 won't make a final ruling on that till y'all get a
2 copy. So Mr. Hammond, if Ms. Bevel would sort of
3 figure out who gets copies and get those passed out
4 to the defendants I think.

5 All right. Generally in the preliminary
6 instruction I put the jurors can take notes. I give
7 them cautionary instructions about notetaking and not
8 get too hung up on notetaking. Is that acceptable
9 this time around as well?

10 (Mr. Lahann entered the courtroom.)

11 MS. ARMIJO: Yes, Your Honor.

12 THE COURT: How about from the defendants?
13 I'll say that it sure looked to me like they were
14 taking notes. It looked like that was something that
15 they did throughout the trial. And I think several
16 times it came up that we noted that on the record
17 that they were taking notes. Anybody have any
18 objection to that? All right. Not hearing anything,
19 I'll put into the preliminary instruction they can do
20 notetaking. And I'll caution them about not getting
21 hung up on notetaking, and leave their notes in the
22 jury room overnight.

23 I also put in a paragraph about questions
24 by jurors. I asked them to write out questions, give
25 it to the courtroom deputy while the witness is still

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1 on the stand and show them to you. I don't typically
2 ask questions of witnesses, and I don't recall if I
3 did in this trial at all, but I don't typically do
4 that. I'll show it to you. If we can work it in,
5 fine; if we can't, we won't. But anybody have any
6 problem with that being put in there? We did get a
7 few questions from the jurors. Some of them were
8 interesting, but I'm not sure that we did a whole lot
9 with them. Sometimes they were just -- all right.
10 So not hearing anything --

11 MR. CASTLE: Your Honor, with regards to
12 jury questions, is the Court going to allow us to do
13 follow-up questions?

14 THE COURT: I'm not talking about voir dire
15 yet.

16 MR. CASTLE: No, no, I'm talking about if
17 the juror asks a particular question, opens up a new
18 area.

19 THE COURT: Well, I'll show it to you. If
20 you want to go into the area, that's fine. If for
21 some reason you want me to go into it, I'll do it.
22 But I'll show it to you before I do anything, and let
23 you kind of decide how you want to go into it.
24 Typically, what happens is the lawyers take care of
25 it. They either say: We can't go into that area, we

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1 don't want you to go into it, Judge, or we'll take
2 care of it, we'll ask the questions. So that's
3 typically my experience. Probably yours, too, right?

4 MR. CASTLE: Yes.

5 THE COURT: All right. So we'll put that
6 in there. We used six alternates for the trial. So
7 we had 18. You can see how the jury box is set up
8 for 18. We did lose two jurors. I think we lost a
9 real juror -- if I'm not mistaken, we lost one real
10 juror to the flu about the second or third week, it
11 might have been the fourth week, I can't remember.
12 And then we lost an alternate literally first day of
13 last week, Monday. So we juggled some alternates,
14 but we now have four alternates still under charge,
15 so that's where we are.

16 Anybody want to deviate from that? Do you
17 want to keep the six alternates?

18 MS. ARMIJO: Yes, Your Honor. Especially,
19 I think, because we'll be getting into summertime and
20 things like that, it might be wise.

21 THE COURT: Maybe we'll get past flu
22 season.

23 MS. ARMIJO: They will.

24 THE COURT: Maybe.

25 MS. ARMIJO: Although I've had flu in April

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1 SO --

2 THE COURT: My grandkids were fighting it
3 again this weekend. They just get the flu.

4 How about the defendants? Are y'all
5 comfortable with 18? Anybody want a different
6 number? And how about -- do you want to discharge
7 them at the end? Do you want to keep some under
8 charge? Keep all of them under charge? What's the
9 Government's preference?

10 MS. ARMIJO: I think we keep them under
11 charge and just wait to see how many -- if we haven't
12 lost any or not. We may not need to leave all six,
13 but certainly we can revisit that.

14 THE COURT: Okay. So at the beginning you
15 want to keep all under charge?

16 MS. ARMIJO: Yes.

17 THE COURT: How about the defendants? Are
18 y'all comfortable with that? All right. So at the
19 present time, when I excuse the jurors and keep the
20 alternates here, I'll keep them under charge, as I
21 have under the first trial.

22 Let's talk about how we're going to run the
23 trial. We ran a fairly traditional schedule this
24 last time. We ended up work pretty much 8:30 to
25 5:30, which is pretty long days, but it allowed us to

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1 keep our word to the jury. And I'd be a little
2 reluctant to do something else. It's going to be a
3 little bit more logistics for the marshals to have
4 people in here at 8:30, but Ms. Wild has talked to
5 them and they've assured us that they'll be able to
6 do that. So, you know, we could try to do something
7 different. We could try to front-end load something.
8 I think it's hard to get everybody in here before
9 8:30. So I'm not sure that we can do much more than
10 run the sort of traditional schedule that we ran
11 here. I guess there is a possibility we could
12 front-end load the day, take a couple of breaks, no
13 lunch break, and break a little earlier in the day,
14 so you can prepare for the next day. But I don't
15 know. What's your thoughts? Do you want to keep it
16 the same schedule we basically ran the last trial?

17 MS. ARMIJO: I believe so, Your Honor. I
18 know that we didn't have like a set lunchtime
19 depending on the days. And I think the jury was
20 flexible with that. But I think they definitely
21 wanted their lunch. And the only other thing is I
22 will defer to the U.S. Marshal's Office. I don't
23 know that we could get all the defendants here by
24 8:00.

25 THE COURT: Yeah, that probably is true.

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1 It might be tough. And it's tough to get people
2 through doors. So I'm not inclined to start earlier
3 than 8:30, even if we were to try to front-end the
4 day.

5 How about the defendants? Looks like the
6 Government is saying just stay on a traditional
7 schedule and have a lunch break. Is that what
8 everybody wants, rather than trying to do anything
9 different on this case? Everybody is kind of nodding
10 their head. All right. So we'll run a traditional
11 day.

12 If, by chance, we move this thing to
13 Albuquerque, I may sort of do a little bit different
14 on the lunch breaks. In this last trial, because we
15 were starting at 8:30 -- and we were very good, the
16 counsel, the parties, the jurors were all very good
17 about being here on time. I can't think of a day
18 that we had anyone sort of late. We go from 8:30 to
19 about 10:00. Sometimes we'd get started a little
20 early in here. The counsel were great, they get on
21 in here and we started about 8:15, and that would run
22 to 9:45, and then we take a 15-minute break, and that
23 would put us at 11:30, which is a little early to
24 take lunch. So oftentimes, we take a 15-minute
25 break, go another hour and a half, which put us about

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1 1:15. The jurors seemed to like that. They seem to
2 like the fact that didn't have such a long afternoon.
3 They kind of worked hard in the mornings, and then
4 they kind of got off the afternoon. We might do
5 that. I think if we're down here, we probably will
6 still work around those sort of lunch hours. If
7 we're up there, I may actually take a little bit more
8 of a set lunch, like let y'all go at 11:45, let you
9 have an hour and 15 minutes, and I may stay on the
10 bench and work from 11:45 to noon, try to get maybe
11 some initial scheduling conferences or some
12 time-served sentences or something like that done.
13 But for the present time we'll kind of run the
14 schedule that we ran down here.

15 Openings. All right. Let's sort of chart
16 those out. What does the Government expect the
17 length of its opening to be?

18 MS. ARMIJO: No more than one hour.

19 THE COURT: All right. Let's then go to
20 you, Mr. Benjamin. How long do you think your
21 opening will last?

22 MR. BENJAMIN: Your Honor, we've been going
23 through it, but I don't think I'll be any longer than
24 an hour.

25 THE COURT: Okay. Ms. Harbour-Valdez, Mr.

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1 Burke?

2 MR. BURKE: Less than an hour, no doubt.

3 THE COURT: Okay. Do you have some
4 estimate that I could put down?

5 MR. BURKE: Half hour.

6 THE COURT: Okay. How about Mr. Cooper?

7 Mr. Castle?

8 MR. CASTLE: Your Honor, before I tell you
9 how much time, I want to explain a little bit about
10 how we're thinking of doing the openings.

11 THE COURT: Okay.

12 MR. CASTLE: It was our hope that
13 Mr. Garcia could go first in the openings, and do an
14 overview of Counts 1 and 2, then subsequent counsel
15 can borrow from and not have to repeat. So we
16 anticipate that our opening might be longer than
17 others, but I still think it will be within an hour.
18 But I would ask the Court to consider a little
19 indulgence because we're going to try to cover areas
20 that other defendants are essentially going to be
21 able to use.

22 THE COURT: Okay. And that reminds me.
23 Your order is fine, y'all can just give me the order
24 of however you want to do it. And if you want to
25 give it to me so that I can call and look like we've

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1 coordinated this, that would be great. If we can't,
2 I'll just do the best I can, recognize who is
3 standing up and try to be ready. I will assume,
4 given the comments here, that -- and you don't have
5 to tell me this, if you don't want to, but the
6 defendants, it sounds like the defendants are wanting
7 to make an opening at the beginning of the case,
8 rather than reserve it for the end of the case.
9 Okay, it looks like everybody is going there.

10 Did you have something, Mr. Burke?

11 MR. BURKE: Yes, Your Honor, would you bump
12 me up to 45 minutes just in case. I understand
13 you're going to hold me to that, so I don't want to
14 be stopped at 31 minutes.

15 THE COURT: All right. And so for the next
16 defendants, if you'll tell me, it looks like
17 everybody that's spoken so far wants to do theirs at
18 the beginning. If you know, and you don't mind
19 saying, it just helps me sort of plan and write the
20 preliminary instructions.

21 But Mr. Shattuck, Mr. Lahann, good to see
22 you this morning.

23 MR. LAHANN: Good morning, Your Honor.

24 MR. SHATTUCK: Yes, we'd like to go at the
25 beginning as well, and 45 minutes at the most.

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1 THE COURT: All right. Thank you, Mr.
2 Shattuck.

3 And Mr. Granberg, Mr. Solis, what are you
4 thinking?

5 MR. GRANBERG: Your Honor, we'd like to go
6 at the beginning, and ask for 30, 35 minutes.

7 THE COURT: All right. How about you, Mr.
8 Blackburn, what do you have for Mr. Garcia?

9 MR. BLACKBURN: Your Honor, we would prefer
10 to go at the beginning and request 45 minutes.

11 THE COURT: Thank you, Mr. Blackburn.

12 Mr. Roberts, Ms. Torraco, what do you got
13 for Mr. Gallegos?

14 MR. ROBERTS: I suspect 30 to 45 minutes,
15 Judge, and at the beginning.

16 THE COURT: All right. And Ms. Arellanes,
17 I'm so used to looking for you right here.

18 MS. ARELLANES: 30 to 45 minutes, Your
19 Honor.

20 THE COURT: Thank you, Ms. Arellanes.

21 MS. ARMIJO: Your Honor?

22 THE COURT: Yes.

23 MS. ARMIJO: I know that in the last trial
24 we were unaware that one of the parties was going to
25 have a PowerPoint. And we would just request -- and

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1 certainly we would do the same thing if there is
2 going to be any exhibits that are going to be used at
3 trial, like pictures from the scene, maybe we could
4 see them ahead of time just so that we can agree so
5 it doesn't create a break. Because I'm certain that
6 we would probably agree to preadmission of the
7 exhibits, if that's going to be used. But we would
8 just like a warning so we don't have to take the
9 time.

10 THE COURT: Can everybody agree to some
11 sort of amount of time? You'll show your PowerPoint,
12 you'll show -- any exhibits you're going to show
13 during the trial, you'll show it to the other side at
14 some specified time before?

15 MR. CASTLE: Your Honor, they're just
16 requesting the exhibits we might use?

17 THE COURT: I think they also want
18 PowerPoints, if you'll just run them past so they can
19 make objections to it.

20 MR. CASTLE: Well, I disagree, unless
21 they're going to show me their opening statement in
22 advance, write it out, and let me go through it and
23 parse through it and make objections to their opening
24 statement. A PowerPoint opening is essentially just
25 a visual opening statement, just like any other

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1 opening statement. I don't think there is any
2 problem with exhibits, and notifying the other side
3 of the exhibits that might be used. But those that
4 might use a PowerPoint, frankly, it's a work in
5 progress that happens all the way until it's
6 presented, essentially. So I have a problem with
7 that generally, because I think we're going to
8 micromanage openings with objections, et cetera.

9 I know, when it came up in the first trial,
10 they raised an objection and went to the bench, the
11 Court overruled the objection and proceeded. But
12 like I say, exhibits are fine, but I don't know of
13 any precedent to basically preview your opening with
14 opposing counsel.

15 THE COURT: Okay. Well, I have to agree
16 that I probably can't force this. We can reach a
17 stipulation that -- I think that would be fine. Do
18 be cautious. Try to not put stuff in your
19 PowerPoints or in your openings that are going to
20 draw objections, and I've got to pull it off the
21 screen and stuff. So try to use some good judgment
22 about that.

23 I remember I had a trial out in San
24 Francisco, and my partner had all these -- y'all
25 remember the days of juror notebooks, you remember?

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1 I know that sounds like stone age now. But he put a
2 bunch of exhibits in there that the other side didn't
3 agree to, and that just delayed everything, you know.
4 He sent me in -- it was a civil trial. He sent me
5 in, he said, read some depositions while I straighten
6 this notebook out. So I went in there and bought him
7 an hour, hour and a half, which is a horrible way for
8 a plaintiff to start a trial, and then came out. And
9 he said: "Do it some more."

10 I go, "I don't have any more." So try to
11 avoid that. Let's try to get off to a good start and
12 make sure it's pretty sanitized.

13 So I guess we have an agreement on
14 exhibits. If you're going to use exhibits, you'll
15 show those to each other before the trial starts.
16 But as far as PowerPoints, I tend to agree, they're
17 probably a work in progress. So all I can do is kind
18 of give you an admonition to try to think about
19 putting yourself in the shoes of the other side, and
20 not trying to do something that's going to draw an
21 objection and delay the trial, and delay your opening
22 as well.

23 Everybody -- I know the Government wanted
24 more -- but everybody agree with that from the
25 defendants' standpoint? All right. So we'll go with

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1 that.

2 Let's talk about voir dire. Voir dire. I
3 guess some of you saw voir dire and saw how I did the
4 voir dire in the first trial. That was the first
5 trial that I didn't get a jury picked the first day;
6 did get it picked in two. And I think we got a very
7 good jury. They're a wonderful group to work with.
8 We'll see what they do, see if they finish strong.
9 But they seem like a wonderful group. So I think the
10 hard work that we all put into the first voir dire --
11 so you got to see how I conducted the voir dire. And
12 I think I front loaded a lot of the questions that
13 the lawyers would be concerned about, I took it on my
14 time to ask questions and things like that. So I
15 guess the question that I have on the voir dire is,
16 if you have questions about how I do voir dire? And
17 some of you had multiple trials with me, or seen me
18 do it, or something. So if you need to ask
19 questions, if you haven't, feel free to ask them.
20 But the question I'm trying to get is how long it's
21 going to take you to do your voir dire, and given the
22 way I do voir dire?

23 So let me, first of all, ask if anybody has
24 any questions about how I do voir dire that you
25 haven't learned from your co-counsel, or you haven't

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1 observed or seen me do? Do you have a pretty good
2 feel as to what I'm going to do and take on my time,
3 and stuff? Anybody got any questions? All right.
4 So the question is going to be how long is your voir
5 dire going to last. So Ms. Armijo, what do you
6 think?

7 MS. ARMIJO: No more than one hour.

8 THE COURT: No more than one hour.

9 How about you, Mr. Benjamin?

10 MR. BENJAMIN: Mr. Sindel will be doing it,
11 Your Honor. But in speaking with him, I believe an
12 hour, because we're going to try to coordinate.

13 THE COURT: I'll probably put pressure on
14 everybody to try to keep it under an hour. It was
15 hard enough to kind of just do it. I'm not giving
16 everybody a flat cutoff that I won't consider more
17 than an hour. But let's plan, for planning purposes,
18 keeping it under an hour, shoot for 55 minutes or
19 something like that.

20 See what we've got here. This is a note
21 dated here at Las Cruces on 3/12/18. The time is
22 9:30. It looks like it's still signed by the
23 Foreperson, Juror No. 34, Mr. Laroche. It says,
24 "Your Honor, could we please have some creamer for
25 the coffee. Thank you." Do I hear any objection

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1 from the four defendants in the first trial?

2 MS. JACKS: No.

3 THE COURT: Not hearing any objection. How
4 about from the Government? So I will -- I'm going to
5 put "yes," here, and then we'll track down some
6 creamer. Ms. Standridge, we got a note from the
7 jury. They want some creamer for the coffee. Could
8 you make that happen?

9 THE CLERK: Yes, sir.

10 THE COURT: What exhibit number is this
11 going to be? I'm going to mark this note AQ to Ms.
12 Standridge's clerk's minutes. She'll make a copy,
13 take the note to the jury, and get the creamer to the
14 jurors.

15 All right. So then, let's go to
16 Ms. Harbour-Valdez and Mr. Burke. What do you think
17 your voir dire -- how long do you think yours will
18 last?

19 MS. HARBOUR-VALDEZ: We'd like an hour,
20 Your Honor.

21 THE COURT: Okay. Shoot for 55 minutes,
22 sort of make a plan on that.

23 MS. HARBOUR-VALDEZ: Yes, Your Honor.

24 THE COURT: I'm not giving you a hard
25 deadline. But let's try to keep it at 55; then we'll

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1 just play it by ear, depending upon how the questions
2 are coming in.

3 Mr. Cooper? Mr. Castle? What are you
4 looking at?

5 MR. CASTLE: Your Honor, if I ask for two
6 hours will you give me an hour and a half?

7 THE COURT: Well, shoot for 55. I'm going
8 to be consistent. I'm not going to say flat no.

9 We've got to get a feel for it. I mean, every voir
10 dire is a little different. And I'll be flexible.

11 MR. COOPER: That's right. Sometimes
12 jurors start talking and they talk more than other
13 jurors. And I know when to sit down time.

14 THE COURT: All right. I know you do.

15 All right. Mr. Shattuck, Mr. Lahann, what
16 are y'all thinking?

17 MR. LAHANN: Your Honor, we expect an hour,
18 but probably much less.

19 THE COURT: All right. In your planning
20 shoot for 55.

21 MR. LAHANN: Yes, Your Honor.

22 THE COURT: Mr. Granberg, Mr. Solis.

23 MR. GRANBERG: Your Honor, we'll shoot for
24 the hour as well.

25 THE COURT: Draft up for 55, because I may

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1 have to sort of enforce it at some point.

2 MR. GRANBERG: Your Honor, one additional
3 matter. If you would excuse Mr. Chavez, he needs to
4 use the restroom. He needs to cross over and --

5 THE COURT: All right. Let's go ahead
6 while I'm getting this. I'm not going to be dealing
7 directly with him, so maybe he can get in and out
8 pretty quick, and we can keep going here.

9 Let's see. Mr. Blackburn, what do you have
10 for Mr. Garcia?

11 MR. BLACKBURN: Judge, do you think I can
12 do anything under two hours?

13 THE COURT: You can't?

14 MR. BLACKBURN: Not with you. You've seen
15 that before.

16 THE COURT: All right. So you're at the 55
17 minute mark?

18 MR. BLACKBURN: Yes, Your Honor, how about
19 57 and a half?

20 THE COURT: All right. Mr. Roberts, Ms.
21 Torraco, what do you think?

22 MR. ROBERTS: Judge, 42 minutes.

23 THE COURT: All right. You're like my son.
24 When he was a little boy, he came in and asked me to
25 wake him up "at approximately 5:46." He didn't know

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1 exactly what the word approximately meant yet.

2 All right. Ms. Arellanes, what are you
3 looking at?

4 MS. ARELLANES: About 40 minutes.

5 THE COURT: All right. So I'll -- after I
6 get all those totals, I'll look at it, and begin to
7 see what we have as far as what we're looking at.

8 But it looks like we're going to be probably crawling
9 into that second day, given the math y'all are
10 putting there.

11 MS. ARMIJO: Your Honor, may I ask one
12 other question with reference to voir dire?

13 THE COURT: Yeah.

14 MS. ARMIJO: As you know now, down here in
15 Las Cruces, the clerk's office and the judges here
16 use numbers as opposed to names. Regardless of where
17 the trial is, we would make that request. Because as
18 you saw what happened the second day, we had to
19 excuse a few jurors who were uncomfortable with their
20 personal information and their name being used.

21 THE COURT: What I have done for the second
22 trial to avoid any sort of issue there is Mr. Sorrell
23 has sent out a note to his staff saying they are not
24 to tell the jurors anything about how I'm going to
25 conduct this trial or how this trial will be

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1 conducted other than what is public information;
2 i.e., what is in the cover letter, what is in their
3 standard information, and what is in the sort of
4 standard information. They're not to tell the jurors
5 that I'm going to use numbers. They're not going to
6 say I'm going to use numbers for security purposes.
7 They're not going to do anything that gets off script
8 so that we don't have it.

9 I have seen the memo, discussed it with
10 Ms. Wild. We feel like it was an adequately strongly
11 worded, sternly worded memo that should solve the
12 problem. I think they're aware of the issues that
13 they created for us in voir dire, and that they're
14 not going to do that again.

15 But let me hear from the defendants. Do
16 the defendants prefer that I use numbers or you
17 prefer I use names?

18 MR. COOPER: Names always.

19 THE COURT: Well, I think I'm going to use
20 names. If there are people that are fearful of being
21 on this jury, we need to know about it, and we need
22 to deal with it. I think this is just a part of this
23 process. We got some questions embedded into the
24 questionnaire that actually is going to probably kick
25 up some responses that, you know, we're going to have

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1 to deal with on the 9th, just as we had to deal with
2 answers in the questionnaire. I understand that the
3 first round of jury questionnaires went out to
4 counsel on Friday. Affirmative nods there, so y'all
5 got the first --

6 MS. ARMIJO: The United States did not get
7 them.

8 THE COURT: You didn't get them?

9 MS. ARMIJO: We got nothing. All three of
10 us.

11 THE COURT: Well, hold on.

12 MS. ARMIJO: Did the defense get them?

13 MS. HARBOUR-VALDEZ: We got a link on
14 CM/ECF.

15 MS. ARMIJO: No, the United States was left
16 out.

17 THE COURT: All right. Let me tell
18 Ms. Wild. All right. So I sent a note to Ms. Wild.
19 Maybe I'll get you an answer here pretty quick.

20 Let's see where I was on -- oh, I was going
21 to tell you that I may, and most likely will, and
22 probably have already made the decision -- I hope I
23 remember this exactly right -- I'm going to do
24 bringing in jurors a little bit differently for the
25 trial than I did the first trial. Just because,

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1 heretofore, I'd always been able to pick a jury out
2 on the first day. So this was the first trial that I
3 had had where I had not been able to pick a jury the
4 first day. Sometimes it was long days, we went to
5 6:00, 6:30, but I'd always gotten it done. Given
6 what you've just told me about voir dire, given that
7 we've got more defendants, I don't think I'm going to
8 be able to speed it up. So what I'm probably going
9 to do is bring in the first wave on Monday, and I'm
10 not going to bring in the second and third wave. So
11 I think what I'm going to do is bring in the first
12 wave. We will still bring in 60 into the courtroom.
13 I'll probably have a handful, 10 or so people, 10, 15
14 people in the jury assembly room that will be part of
15 wave one. We'll bring 60 in. So I'll try to get 60
16 people in the seats. And then we'll start it there.
17 And if we -- I think we were able to get our jury out
18 of that 60 in this last trial. So I think we've got
19 a good shot at doing that again. I think any more
20 than that just makes it very hard to do voir dire
21 because, as you know, it's always Juror No. 59 back
22 there that raises their hand on every question. So
23 if you start getting 70 in here, it just makes it
24 longer. So I think I'd rather work with that 60,
25 like we did the first trial and then see if we can

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1 get it. If we can't, then we'll bring in some
2 number, we'll agree to some number in advance, or at
3 the time, to try to complete the jury selection. And
4 then I'll bring the second wave in the next day. So
5 if we don't get it done the first day, we're sort of
6 guaranteeing that we'll go into the second wave. I
7 don't know about the third wave. I don't know if Ms.
8 Wild has decided to bring in the third wave on
9 Wednesday or bring them in sometime the next day, or
10 on Tuesday. But I am going to make that adjustment
11 to try to just help us with having so many people
12 waiting that first day. We'll have a large number of
13 people waiting probably the second day, but I don't
14 know if we can avoid it.

15 All right. I think that covers those
16 aspects. Like I said, we're going to have to figure
17 out the logistics of the courtroom. And we'll work
18 with you on that. I think we were all very good --
19 we didn't have any mishaps in the first trial, but I
20 would ask everybody, the Government, my staff, me,
21 certainly defense lawyers, help me out. We don't
22 need to have a mistake with an increased number of
23 defendants. Make sure we've got everybody seated at
24 the table before we bring that jury in. We don't
25 want the jury to ever see a defendant shuffling in or

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1 out of the courtroom. I just don't want to try to
2 raise that issue. So try to help everybody out by
3 looking around, make sure that everybody is here.
4 But we did it the first trial, but we're going to
5 have probably a little higher numbers here, so we'll
6 have to work together.

7 MR. ROBERTS: Judge, may I just make an
8 observation. Sitting here in the jury box, I can see
9 through the paneling there. So, I mean, if there is
10 a concern with ankle bracelets and so forth, I can
11 see right through the cloth. So the Court may want
12 to consider changing what's there, using a
13 different --

14 THE COURT: We'll look. I mean, we went to
15 great lengths, and nobody could see anything. So
16 I'll relook. But we had a lot of people sitting
17 where you were for the first trial. I think all the
18 defense lawyers came in. We had the defendants come
19 in. We had them stand, we had them walk, and nobody
20 could see anything. So we'll do a real careful
21 check. It may be a little worn down after seven
22 weeks but we started off real strong. So we'll take
23 a look at that.

24 MR. ROBERTS: I understand, Judge. I think
25 partly the lighting, because the lighting reflects

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1 back. And this cloth over here is different
2 material. You can't see through this one, but you
3 can see through that one.

4 THE COURT: All right. We'll take a look
5 at that, and we'll do a lot of checks before we start
6 the second trial. And probably it's going to be
7 different tables and everything.

8 All right. So probably at this point let
9 me say this on exhibits: Again, the Government gets
10 numbers, so it's kind of easy for them, 1 through
11 whatever. The defendants get the letters, and again
12 it's A through Z, and then after that, it's AA and AB
13 and AC. If it's more than that it's BA, BB, BC.

14 I was a little uncomfortable, I've got to
15 tell you, about the defendants' numbering system.
16 But Ms. Wild kept telling me to settle down, so I let
17 it go. But that was -- seemed crazy to me. But I
18 think we made a good record. All our exhibits
19 matched up. So I'm not going to get too worked up
20 about that.

21 I know we probably need to get started on
22 these motions to decide some of the exhibits, but is
23 there any issues about exhibits that I can help you
24 with that's independent of the motions? And if there
25 is a motion there that we need to deal with exhibits,

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1 then I'll just stop and start going to the motions.

2 But how about from the Government's
3 standpoint? Are there any issues with exhibits that
4 I can help you with this morning?

5 MS. ARMIJO: No, Your Honor.

6 THE COURT: Okay. How about from the
7 defendants' standpoint? Is there any issues with
8 exhibits?

9 MR. CASTLE: Your Honor, we don't have any
10 issues with the exhibits, but I'm wondering if I
11 could raise two matters concerning the pretrial
12 conference.

13 THE COURT: Okay.

14 MR. CASTLE: Your Honor, we had filed a
15 motion for additional peremptory challenges. And at
16 the time the Court denied it without prejudice to
17 reconsider that at the eve of trial. I believe, but
18 I don't know for certain, that the Court had granted
19 some extra peremptories to Trial 1.

20 THE COURT: No, I didn't.

21 MR. CASTLE: Oh, you didn't. Okay.

22 THE COURT: I did not. What we did is
23 there were additional peremptory challenges, whatever
24 it is under the rule. And I'd have to refresh my
25 memory as to alternates, because we had six

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1 alternates. And I forget, was it three? That's my
2 memory as to what the statute or the rule requires.
3 Do you remember? You looked it up. I think it's
4 three. So when we get the jury confirmed, I'll then
5 give you the first six tentative alternates, and then
6 I'll give each side three challenges. If that's what
7 I did the first trial, I'll do it the second trial.
8 So you get three challenges as to the alternates.
9 But with this number of people and the number of
10 defendants, I didn't feel like I could give really --
11 I just didn't feel like I'd ever get a jury picked if
12 I started giving additional peremptory challenges.
13 And it was difficult enough the first time with four
14 defendants. And I don't think I'll be giving extra
15 peremptory challenges to the defendants the second
16 trial.

17 MR. CASTLE: I understand. I'll just make
18 a brief record. I think that the fact that we have
19 double the number of defendants is actually a factor
20 that should militate towards additional peremptory
21 challenges. Because if you start taking the number
22 that we have per defendant, and if you divide it by
23 the number of defendants, if that's the way the
24 defense has to do it, essentially, we're getting one
25 or two per defendant.

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1 There are four different crime bases -- or
2 five, is it -- I can't even keep track of the number
3 on the second trial. But it's five different crime
4 bases; whereas, there weren't that many in Trial 1.
5 So I know that the law is it's completely in your
6 discretion. It's frankly almost unchallengeable on
7 appeal. I understand that. But I would encourage
8 the Court to at least consider it, given the
9 complexities that Trial 2 presents.

10 THE COURT: Well, the reason I'm saying
11 without prejudice is, if the numbers were to reduce
12 dramatically, then I'd certainly take another look at
13 it. But at the present time, I just think it's going
14 to be impossible for us to give additional
15 peremptories and pick a jury. So it will be denied
16 without prejudice to you renewing it if we look at
17 some different number of defendants as we get closer
18 to the trial.

19 MR. CASTLE: The second issue is the
20 seating arrangement the Court discussed, I'm not sure
21 I understand it completely, but it sounded like the
22 defendants would not be sitting with counsel.

23 THE COURT: Well, you'd be sitting with
24 counsel, but the counsel would be in front of the
25 defendants. So the defendants would be behind the

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1 counsel. The counsel would be in a table immediately
2 in front, and then defendant immediately behind, so
3 you'd have your defendant right behind you.

4 MR. CASTLE: Your Honor, I would prefer to
5 be with my client so that we could have contact
6 without having to turn our back to the witness and to
7 the jury. A lot of times we have to have
8 communications with our client while evidence is
9 being presented. And that process prevents counsel
10 from paying attention both to what's happening in the
11 courtroom and their client. And so that's one issue.

12 The second is, I understand the first jury
13 had some difficulty at least figuring out who
14 everybody is. When we put all the defendants in a
15 line-up, essentially a row together, they're lumped
16 together as a unit. I think the visual actually
17 favors the prosecution's theory in the case, frankly.

18 And so I think the idea of the separate
19 tables for Trial 1 was very good because it
20 essentially told the jury: These are separate
21 defendants, and you need be analyzing in a distinct
22 way. This is not just one big group.

23 And so I think I speak -- we didn't confer,
24 but I think I speak on behalf of all the defendants
25 that we would prefer an arrangement where we would

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1 have separate tables. And if that means going to
2 Albuquerque for a larger courtroom, I think the
3 rights of the defendants in getting a fair trial
4 trump the particular location of the trial itself.
5 It still is in the district. And as the Court knows,
6 this is one district; we don't have southern and
7 northern district of New Mexico. So we would prefer
8 that. I know the Court is working hard to try to
9 figure out what's fair for everyone.

10 But I do think, I don't know what
11 Ms. Jacks' experience is, but my experience is we
12 want to be able to have confidential communications
13 with our client. We want to be considered
14 independently of the guilt of the other defendants.

15 And frankly, our theory of the case is our
16 client didn't have anything to do with the crimes in
17 Counts 1 or 2, independent of whether the other
18 defendants did. And so I don't want the jury to
19 think we're all in this as a big defense team, where
20 all the defendants are in it together.

21 So those are my thoughts for the Court to
22 consider when it's considering the courtroom
23 arrangements.

24 THE COURT: Well, I'll take those into
25 account. And I don't think I can do what I've done

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1 here, unless the numbers drop dramatically. I don't
2 think you're going to get individual tables. I think
3 we're going to have to look at two tables. If there
4 is other things we can do with the two tables, like
5 put some defendants together on one row, and with
6 their counsel, or something like that -- I'll talk to
7 Ms. Wild about that, if that helps with the optics.
8 So we'll have a dialogue about this.

9 I do think that right at the moment with
10 these numbers, whether I have the trial in
11 Albuquerque or here, it's going to be two tables. So
12 start working with that concept. If there is
13 something I can do to help with the optics, I'm all
14 for it. I want you to get the same benefit that the
15 first group got of having, you know, the optics of
16 being separate, forcing the jury to consider each
17 separately. So I'll work with you as much as I can
18 on that. But start thinking of two tables. Because
19 just logically we can't get eight defendants'
20 tables in here. And I can't do it in the Rio Grande
21 up there. So I'm going to build two tables. So
22 think about that, the present numbers, how can I get
23 you there.

24 MR. CASTLE: Severance is one way.

25 THE COURT: I figured I might hear that

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1 today.

2 All right. Mr. Burke?

3 MR. BURKE: Yes, Your Honor. I'm sensing
4 that you've already thought about the motions for
5 severance. And it doesn't sound like that's too
6 optimistic for the defendants. That would be one
7 way.

8 THE COURT: Yeah.

9 MR. BURKE: And I do want to endorse
10 Mr. Castle's comments about the idea of separation.
11 It's very critical to having the jury independently
12 evaluate each defendant.

13 But that's not why I'm up here. I did have
14 a logistical question of a pretrial nature. In your
15 order granting the joint motion to amend the fourth
16 scheduling order, which is Document 1626, you set
17 deadlines for jury instructions, proposed voir dire,
18 and exhibit lists. And I am guessing that the date
19 for objections to the exhibits would be a week after
20 that, judging from what the practice was in the prior
21 orders. Is that correct, Your Honor?

22 THE COURT: Does that work for the
23 Government?

24 MS. ARMIJO: Yes, Your Honor.

25 THE COURT: All right. Does that work for

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1 all the defendants?

2 MR. BURKE: So that's a firm date for
3 objections. All right, thank you, Your Honor.

4 THE COURT: Ms. Harbour-Valdez

5 MS. HARBOUR-VALDEZ: Your Honor, we'd also
6 request that, like you did in the first trial, that
7 you order the Government to provide a may call and a
8 will call witness list two weeks prior to the start
9 of the trial, which would be March 26.

10 THE COURT: Is the Government agreeable to
11 that?

12 MS. ARMIJO: I think that we have narrowed
13 it down to will call. The first list is pretty much
14 a significant long list. But we have it narrowed
15 down, and so I think that everyone we put on there
16 has a pretty good chance of being called. If there
17 is people that we're going to add in that are just
18 potentials, we will do it. But right now the list
19 that we're working on will be a list that is pretty
20 significant.

21 THE COURT: So your will call list that you
22 have now and that you probably will have on May (sic)
23 26 is probably the list, and then you may have a
24 shorter may call list that --

25 MS. ARMIJO: Yes. If after we meet -- as

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1 you know, we've been busy -- if after we're able to
2 meet and decide on additional people to put in there,
3 then we would put in the list that we filed potential
4 witnesses.

5 THE COURT: Okay. Does that sound like
6 what you need?

7 MS. HARBOUR-VALDEZ: Just for
8 clarification, so this is your will call? The 16
9 pages?

10 MS. ARMIJO: No.

11 MS. HARBOUR-VALDEZ: So when are we going
12 to get that one?

13 MS. ARMIJO: Well, I believe we haven't
14 gone through the deadlines yet.

15 THE COURT: Well, she's asking for May
16 26 --

17 MS. HARBOUR-VALDEZ: March.

18 THE COURT: I mean, March 26 to give a --

19 MS. ARMIJO: We could, but we would ask for
20 a reciprocal date before -- I don't have the order in
21 front of me, but I believe previously we had dates
22 that both parties gave witness lists. So as long as
23 the defense wants to give their witness list on March
24 26, that's fine.

25 THE COURT: Do y'all want to do a

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1 reciprocal exchange of witness lists?

2 MS. HARBOUR-VALDEZ: I think we need to see
3 the Government's prior to us providing ours.

4 THE COURT: Let's do this: Let's just -- I
5 mean, I think it's most important to give -- to get
6 the Government's into your hands. So I will set
7 March 26 as the date. Sounds like the Government is
8 pretty far along in figuring out who their will call
9 people may be, and they will have a short list of may
10 call. So I think you're going to get what you want.

11 Why don't the defendants do the same thing.
12 And I understand you may have to revise it after you
13 see the Government's list. So you'll have a chance
14 to do it. But at least at the present time you'll
15 have a reciprocal exchange, with the understanding
16 that after the Government shows you their list, you
17 may have to revise your list.

18 MS. HARBOUR-VALDEZ: And Your Honor, Mr.
19 Cooper pointed out that the prior deadline would have
20 been March 23 for the will call list. The Jencks
21 deadline was March 26.

22 THE COURT: All right. So the Government
23 is shaking their head yes.

24 MS. ARMIJO: That's fine, Your Honor. We
25 can do the 23rd. And then if the defense wants file

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1 their witness list on the 26th, have the weekend,
2 that's fine, too. We'll provide ours the 23rd.

3 THE COURT: All right. So let's do that.

4 All right. Mr. Blackburn.

5 MR. BLACKBURN: Your Honor, I know that you
6 were -- I agree with Mr. Castle and Mr. Burke's
7 comments about the optics. The Court keeps talking
8 about two tables. Have you -- do you have something
9 in mind? Have you started? Is there -- are we
10 talking two tables like this? You keep talking about
11 building something, so I'm just --

12 THE COURT: I think it's going to be taking
13 a table like this and building it. I don't know
14 about the width, but it's going to have to be built
15 to fit two tables in either place, so instead of sort
16 of running them like this, it will run lengthwise.
17 And it will just be two tables lined up rather than
18 separate tables for counsel and paralegals and
19 parties.

20 MR. BLACKBURN: There was some discussion
21 about construction. I didn't know if the Court was
22 saying you've already started doing that, or if it's
23 something we could look at in the meantime.

24 THE COURT: I don't know the answer to
25 that. I don't know where Ms. Wild is on that work.

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1 So whoever is sort of -- maybe Ms. Harbour-Valdez is
2 the liaison. Maybe you can check with Ms. Wild as to
3 where you are on the tables. But I don't know at the
4 present time.

5 MS. HARBOUR-VALDEZ: Your Honor, I'll be
6 happy to do that.

7 One more item. In the first trial you
8 signed an order allowing the defense staff to bring
9 their cellphones in. I submitted a similar order to
10 Ms. Standridge and Ms. Wild this morning. I believe
11 Ms. Bevel has it now.

12 THE CLERK: I have that.

13 MS. HARBOUR-VALDEZ: We would request, Your
14 Honor, that you sign that this week. Some of the
15 defense witnesses that have been subpoenaed have our
16 staff members' cellphone numbers on them as the
17 contact, since we would not able to step out and
18 answer those. So we would ask you sign that.

19 THE COURT: Is there any objection from the
20 Government on that order?

21 MS. ARMIJO: No, Your Honor.

22 THE COURT: Any other objections from the
23 defendants? All right. So when that order is
24 presented to me, I'll sign it and get it entered.

25 MS. HARBOUR-VALDEZ: Thank you, Your Honor.

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1 THE COURT: All right. Any other issues on
2 exhibits? And can anybody think of any motions that
3 raise any exhibit issue?

4 If not, I'm going to move to witnesses.
5 And this may trigger up some of the motions, so maybe
6 I'll need to stop and deal with motions. But is
7 there any issues or disputes with witnesses that I
8 need to deal with or can deal with today?

9 MS. ARMIJO: No, Your Honor.

10 THE COURT: The Government is shaking their
11 head no. How about from the defendants? Any issues
12 other than -- is there anything in the motions that I
13 need to address?

14 MR. CASTLE: There was a motion filed by a
15 witness' attorney.

16 THE COURT: Yeah.

17 MR. CASTLE: The witness being Leroy Lucero
18 by Mr. Fallick. And Mr. Fallick says he can be here,
19 I believe, at 1:00 --

20 MR. COOPER: Yes.

21 MR. CASTLE: -- to address that issue.

22 THE COURT: Well, if that's the only issue
23 on witnesses --

24 MR. COOPER: There is another one, Your
25 Honor.

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1 THE COURT: Let me see what Mr. Cooper has,
2 then Mr. Castle. I'll come back to you, Ms. Armijo.

3 MR. COOPER: Your Honor, I just saw that
4 Phil Sapien has filed a motion to quash the writ with
5 regard to Fred Quintana.

6 THE COURT: Is that another one of the
7 people you've subpoenaed on the motion to dismiss?

8 MR. COOPER: That's correct. He just filed
9 a motion just five minutes ago, maybe.

10 THE COURT: Okay. Well, I don't have a
11 copy of that, and I haven't read it. But I'll take a
12 look at it, we'll get it.

13 MR. COOPER: Neither have I.

14 THE COURT: I guess at some point I want to
15 talk to you about the motions to dismiss. And maybe
16 that's the time to talk about these witnesses.

17 Mr. Burke, did you have anything?

18 MR. BURKE: No, my comment was --

19 THE COURT: The same one? All right. So
20 if there is no other issues and disputes other than
21 those connected with the witnesses as to the motions
22 to dismiss, why don't I --

23 MR. COOPER: Your Honor, excuse me. May we
24 have one second to confer?

25 THE COURT: Certainly.

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1 MR. BENJAMIN: Your Honor, while they're
2 conferring on that, can I raise a purely
3 administrative --

4 THE COURT: You may.

5 MR. BENJAMIN: I think Trial 1 was able to
6 get the courtroom opened up at 7:30 in the morning so
7 that counsel could come in and out, and kind of prep
8 for the day, Your Honor. I would just ask that that
9 continue.

10 THE COURT: Yeah. Let me ask Ms.

11 Standridge: Do you see any problem with that from
12 the logistics standpoint?

13 THE CLERK: We have to get it cleared by
14 the U.S. Marshal.

15 THE COURT: All right. I'll work to get
16 that done. I don't anticipate any problems with the
17 marshals. I'll get back with you, or Ms. Bevel will
18 get back with you on it. But the rules were that I
19 can't let in jurors before 8:00. But they can start
20 letting them in. But so that y'all don't have to
21 stand in line, we'll let y'all in early, if you want
22 to be here early. You don't have to be here early.
23 But let you in. And my understanding was there was a
24 key given to one of the paralegals, that had a key to
25 then this room that was designated, and if y'all want

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1 to just tell us who. So unless you hear otherwise,
2 plan on that being also the case in the second trial.
3 If I run into problems with the marshals, we'll let
4 you know and we'll work those out.

5 MR. BENJAMIN: One second issue, Your
6 Honor. The Court has mentioned Albuquerque multiple
7 times this morning, and that makes me a little
8 nervous, simply because at this point in time, Your
9 Honor, we've made funding requests and are getting
10 close to deposit deadlines on the properties.

11 THE COURT: Right. I understand. I
12 actually thought about having this hearing in
13 Albuquerque because of the numbers we were looking
14 at. But because I had already funded you guys to be
15 here, I already had subpoenas out for this week, I
16 decided not to try to do anything with this week.

17 So Ms. Wild told me I was probably okay if
18 I wanted to do something down the road, but I didn't
19 try to mess around with this week because I knew that
20 exact problem. And I know that I'm going to have to
21 probably make some decisions sooner rather than
22 later, if I don't want to avoid the same problems
23 April 9.

24 MR. BENJAMIN: The 15th would make me less
25 nervous than the 16th for funding, Your Honor.

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1 THE COURT: What would make you --

2 MR. BENJAMIN: It's just I have a week for
3 residence that we've put, and essentially the way we
4 structured the agreement, Your Honor.

5 THE COURT: Well, I'll try to work with
6 Ms. Wild as soon as I have some time, and try to make
7 some final decisions on that.

8 MR. BENJAMIN: Thank you, Your Honor.

9 THE COURT: All right. Did you have
10 something else, Mr. Cooper?

11 MR. COOPER: I do, Your Honor. Thank you.

12 Judge, we have subpoenaed Jim Moore and
13 Cheryl Lackey, two former Department of Corrections
14 employees who are presently living in Oklahoma. They
15 are now married; they have a four-year-old child that
16 has some fairly significant issues. And anyway,
17 they've requested to appear telephonically with
18 regard to the subpoena that we've issued.

19 And also Reeve Swainston we have
20 subpoenaed, and he would like to appear
21 telephonically. And we told them, all three of them,
22 that we would discuss with the Court whether or not
23 that is something that they could do. And we would
24 like to get back with them today, if the Court will
25 allow their appearances to be had telephonically.

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1 THE COURT: Well, are all the defendants in
2 agreement on that, that would be okay with them? All
3 right. So not hearing any objections, I don't have a
4 problem, if the defendants don't. I guess, if it
5 were the other -- Government trying to bring people
6 here and you not have people to confront, I might
7 have a little concern. But if the defendants have
8 subpoenaed these people and want them here, and
9 they're comfortable having them by telephone, I don't
10 have a problem.

11 How about the Government? Are y'all
12 comfortable with that as well?

13 MS. ARMIJO: Yes, Your Honor.

14 THE COURT: All right. So it would make me
15 a little nervous if it was the other way because of
16 confrontation issues. I'm not sure they cover it,
17 but it would just make me pause. But I think if
18 defendants are calling them and comfortable with
19 that, I think I'm okay with it.

20 MR. COOPER: Okay. Thank you, Judge.

21 One final matter: I think we will
22 designate Cindy Gilbert to be the llavera, the
23 keyholder.

24 THE COURT: Were you at the first trial?

25 MS. GILBERT: Yes, Your Honor.

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1 THE COURT: I didn't quite know what
2 paralegal had the keys.

3 MR. COOPER: She's going to have the keys.

4 THE COURT: She's got the keys. We heard a
5 lot about having the keys in the first trial. So it
6 has different meanings, doesn't it?

7 MR. COOPER: She's our leader.

8 THE COURT: Okay. All right. Any other
9 issues or disputes on witnesses or exhibits?

10 All right. I think, then, the next issue I
11 was going to go into is discovery. And I know we
12 have motions on discovery, so I think I'm going to
13 stop, now, the pretrial conference. We, obviously,
14 will have to come back to it and finish it up. But I
15 think it would be wise for us now to go to the
16 motions themselves.

17 So, if I understand -- let me look at the
18 new list that was given to me. What Ms. Wild
19 prepared as Tab 32 for me was Document 1903, which is
20 the notice of James statements for Trial 2. And she
21 says "Corrected," and that means that I think 1901,
22 is my memory, was the first document that was filed.
23 And there was some changes to it. I'm not sure what
24 happened. But anyway, it was designated as filed in
25 error, so the document that was filed on 3/8/18,

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1 Document 1803, Notice of James statements for Trial 2
2 Corrected, I think is the operative document.

3 So what I understand -- let's just review
4 for a second -- in the first trial we had the
5 Government provide a witness that -- Mr. Acee, I
6 think, primarily, but I think it was also some other
7 FBI agents that testified, and so they were subject
8 to cross-examination; so that we could get through
9 that and get to the preparation of the first trial,
10 the Government agreed to the defendants' request to
11 provide a list of James statements for Trial 2. So
12 they were treated differently.

13 Now, my understanding was that that was to
14 facilitate what we were doing today, so the
15 defendants would have in hand all the James
16 statements. And then what we would be focusing on
17 today would be maybe statements that defendants
18 wanted me to look at more closely, that they felt did
19 not fall within the co-conspirator exception to the
20 hearsay rule.

21 So, if the James hearing is proceeding
22 differently than what I understand it to be, if we're
23 going to do the same thing we did the first trial,
24 y'all can let me know.

25 Mr. Castellano, you were going to rise and

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1 speak. So do you want to tell me how close I am to
2 understanding what we're doing on the James hearing
3 for this trial?

4 MR. CASTELLANO: The first order of
5 business, Your Honor, is that there were two filings
6 regarding the James statements. And they should
7 be -- the tables themselves should be identical.
8 What happened was, when I filed the first table, the
9 clerk's office called because there is a difference
10 between landscape or portrait formatting for the
11 first page. And so what happened was the second
12 filing is basically the same as the first, but the
13 cover page is just in a different format. So I don't
14 think anybody should have to look at the two tables
15 for different statements.

16 THE COURT: We can use 1903 as the
17 governing document?

18 MR. CASTELLANO: Yes, sir. So that's just
19 a bit of housekeeping. The only difference was the
20 way the cover page was filed, that was changed. The
21 other part is -- my understanding is that the table
22 is now, in essence, supposed substitute for the
23 testimony, so that we have the James statements in an
24 easier to read and easier to understand format than
25 what we did the first time by merely putting on

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1 testimony. If our agents were to testify, I think
2 they would testify consistently with the statements
3 in the table. So we could do that, but I think
4 really that's what the table does, it substitutes for
5 the testimony of those statements.

6 THE COURT: I guess two questions, then:
7 What was your expectation of the defendants in
8 response to your notice of James statements? And
9 then what -- are they going to have somebody such as
10 Mr. Acee available to cross-examine? You might not
11 put on any direct evidence, but are you going to
12 present any agents or witnesses for them to
13 cross-examine?

14 MR. CASTELLANO: I think that's up to the
15 defendants, Your Honor. But, yes, I think if there
16 was a request for cross-examination, then it would
17 come through the agents who would testify in a
18 summary fashion to summarize the statements which we
19 have here in court, and in the table.

20 THE COURT: So you don't have anything else
21 to present; you're ready to hear from the defendants
22 as to either their agreement as to your table or
23 areas where they disagree or their desire for
24 cross-examination?

25 MR. CASTELLANO: That's correct, with one

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1 exception, Your Honor. I have Government's Exhibits
2 11 through 18. And I'm following a similar format as
3 the last time we did the James statements. These
4 exhibits are each of the plea agreements of various
5 people who have pled guilty in this case. And so in
6 terms of establishing the existence of the
7 conspiracy, and tying various defendants to the
8 conspiracy, what I've done is submitted -- or I'm
9 proposing to submit, at this point, Government's
10 Exhibit 11 through 18. And I'll give the Court the
11 names of each of the exhibits:

12 Government's Exhibit 11 is the plea
13 agreement for Leonard Lujan.

14 Exhibit 12 is the plea agreement for
15 Benjamin Clark.

16 Exhibit 13 is the plea agreement for Ruben
17 Hernandez.

18 Exhibit 14 is the plea agreement for Javier
19 Alonso.

20 Exhibit 15 is the plea agreement for Eugene
21 Martinez.

22 Exhibit 16 is the plea agreement for Paul
23 Rivera.

24 Exhibit 17 is the plea agreement for Brandy
25 Rodriguez.

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1 And Exhibit 18 is the plea agreement for
2 Santos Gonzalez.

3 And I would move their admission at this
4 time for purposes of the James hearing.

5 THE COURT: All right. As I did in the
6 first -- the hearings before the first trial, many of
7 which dealt with issues for the second trial, I would
8 be inclined to just have exhibits for each hearing,
9 so that when I go back with some orders or opinions
10 as much as I can on this case, I'll just use those.

11 So you're not admitting these in any way
12 for trial or for any other hearing in this case; it
13 will just be for the James hearing. Any objections
14 to the Government's introduction of Exhibits 11
15 through 18?

16 MR. CASTLE: Yes, Your Honor.

17 THE COURT: Mr. Castle.

18 MR. CASTLE: Yes, if I could look at them
19 first.

20 THE COURT: You may.

21 MR. CASTLE: Judge, these are documents
22 drafted, I believe, by the Government. They all
23 appear to be the same typeset, same language, et
24 cetera. So these are documents that the Government
25 wrote up in a fashion. So I don't believe that

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1 satisfies the requirements under 801 to show the
2 establishment of the conspiracy. I mean, it has to
3 be something more than the Government's statements
4 that there is a conspiracy; there has to be some
5 evidence and foundation of that.

6 THE COURT: Well, correct me if I'm wrong,
7 I'm not sure I've looked at these, but these are plea
8 agreements that were signed, under oath, by the
9 defendants that have been identified; correct?

10 MR. CASTLE: They are.

11 THE COURT: And, Mr. Castellano, is each
12 one of these people going to testify at trial to the
13 facts that are set forth in the plea agreement?

14 MR. CASTELLANO: Yes, I believe, with the
15 exception of two -- Brandy Rodriguez and Santos
16 Gonzalez are not -- but for purposes of preliminary
17 questions before the Court to find whether or not a
18 conspiracy exists, I believe the Court can look at
19 these for purposes of making the initial
20 determination under James.

21 THE COURT: All right. You don't have any
22 reason to think that those two individuals would
23 testify in this hearing, or any other hearing or
24 trial, differently than what they have in their --
25 what they have in their plea agreement?

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1 MR. CASTELLANO: That's correct, Your
2 Honor. It would be supported not only by the reports
3 in this case, but each of these defendants had to
4 give a factual basis to the Court to even plea, so
5 typically, in addition to the factual basis written
6 into the plea agreements, the Court, for each of
7 these individuals asked in their own words why they
8 were guilty of these offenses under oath.

9 THE COURT: But as far as evidence here for
10 the determination of the conspiracy, these are signed
11 under oath by the seven individuals that have been
12 identified?

13 MR. CASTELLANO: Yes, sir.

14 THE COURT: All right. Mr. Castle?

15 MR. CASTLE: They are signed under oath.
16 But what they don't say is: This is a full and
17 complete statement of the facts as they know it
18 concerning the conspiracies. And so they're partial
19 statements drafted by the Government for signature by
20 the defendants, so they're not complete. But those
21 are our objections.

22 Specifically, the two people that are not
23 going to testify at trial, I don't think the Court
24 should take that into account, because all we're
25 doing, preliminarily here, is what you would have to

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1 do during trial. So I don't believe that they should
2 be admitted, although they're not relevant to my
3 client at all. But I would make that general
4 objection also.

5 THE COURT: All right. Anybody else have
6 any objections to Government's Exhibits 11 through
7 18? Mr. Benjamin?

8 MR. BENJAMIN: Mr. Gallegos would join the
9 objections to the exhibits specifically regarding
10 Santos Gonzalez and Brandy Rodriguez, Your Honor.

11 THE COURT: All right. Mr. Burke, same
12 thing?

13 MR. BURKE: Yes. Mr. Troup joins, and
14 particularly objects to the idea that these documents
15 drafted by the Government could be the evidence
16 that's required to show that conspiracy existed for
17 the purposes of the James hearing.

18 THE COURT: And remember, I'm not
19 determining whether they're sufficient or not. The
20 only question is whether I should admit this
21 evidence.

22 Ms. Arellanes?

23 MS. ARELLANES: Yes, Your Honor. With
24 regard to Paul Rivera, I have gone over that plea
25 agreement, and there are some errors in the factual

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1 basis. So the factual basis that was provided to Mr.
2 Rivera -- he just simply signed it -- really, is
3 based on what I've read in the discovery -- is
4 clearly in error. So you have to take his statement,
5 factual basis, with a little bit of a grain of salt.

6 THE COURT: All right. Thank you, Ms.
7 Arellanes.

8 Anybody else?

9 MR. SOLIS: Mr. Chavez, Your Honor, would
10 join in that objection, but in particular Exhibit 11
11 and Exhibit 15, as it pertains to Mr. Chavez.

12 THE COURT: All right. Anybody else?

13 All right. So I'm going to admit
14 Government's Exhibits 11 through 18. I'm not making
15 a determination whether the Government has
16 established a conspiracy or conspiracies as to any of
17 the counts. I'm simply determining that I think I
18 can -- that's competent evidence I can consider for a
19 James hearing, so I'll admit it into evidence.

20 All right. How do the defendants want to
21 proceed? I have reviewed -- I only did 1903; I never
22 went back and looked at 1901, after I was told that
23 1903 was the operative document. So how do y'all
24 want to proceed on the James hearing? Do you have
25 specific statements that you've identified that you

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1 want to have the Court focus on in making a
2 determination? Do you want to have any
3 cross-examination of a government witness as to any
4 of the statements? How do you wish to proceed?

5 Mr. Benjamin?

6 MR. BENJAMIN: Not seeing anybody else jump
7 up, Your Honor, there was a document filed at
8 about -- well, after midnight last night -- it was
9 Document 1981, which was Mr. Gallegos' response to
10 the James hearing --

11 THE COURT: Okay. I'm not sure that I was
12 alerted to that, and I don't believe I have a copy of
13 it. So we'll -- they handed it to me now, so -- all
14 right.

15 MR. BENJAMIN: And I understand that one of
16 the dangers in filing something that late, Your
17 Honor, was I'd be in this position, but having had
18 the Government just proffer 11 through 18, one of the
19 requests that Mr. Gallegos has is that the James
20 hearing serve its purpose of -- for lack of a better
21 term, locking the Government into what it intends to
22 prove for a conspiracy.

23 (Ms. Bhalla entered the courtroom.)

24 THE COURT: Let's do this, let me ask
25 this -- I think this is what we did for the first

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1 trial: If I understand what we're doing here with
2 this, Mr. Castellano, is that these statements that
3 are in your table are the only statements that you
4 are trying to get in through the co-conspirator
5 exception to the hearsay rule. You will not use any
6 other statements, you will not use that exception for
7 any other statements; and if you at any other time
8 attempt to bring in another statement, you will
9 immediately alert the defendants to the fact that you
10 have identified another statement that you want to
11 use the co-conspirator exception for; and if they
12 don't hear from you, or I don't hear otherwise from
13 you, you are locked in with this table, and that will
14 be the universe of statements that you will attempt
15 to get in through the co-conspirator exception.

16 You may have other exceptions and other
17 ways of getting other statements in, but these will
18 be the statements that you'll be locked into as far
19 as the co-conspirator exception; am I correct?

20 MR. CASTELLANO: That is correct, Your
21 Honor.

22 And I've noticed in the pleading itself,
23 statements from Trial 1. And if we do come across
24 other statements in preparation for trial, we will
25 also notice up those statements in a similar fashion

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1 as to what we prepared in the table.

2 THE COURT: All right. When you say Trial
3 1, you're not saying just all the statements in Trial
4 1, are you?

5 MR. CASTELLANO: Yes. I don't intend -- we
6 don't intend to introduce all co-conspirator
7 statements from Trial 1, but I think those are fair
8 game if they come up in the context of this trial.

9 THE COURT: Well, I think we need to get
10 those identified. So I'm going to -- I think, you
11 know, the way I do a James hearing is I want to push
12 as much up pretrial as I possibly can. So let's
13 agree on a deadline by which you'll think about the
14 first trial. And if you want to get in other
15 statements from the first trial, you'll send a
16 letter, or file some document that identifies other
17 statements from the first trial that you want to get
18 in with the co-conspirator.

19 Do you want to propose a date?

20 MR. CASTELLANO: May I have a moment, Your
21 Honor?

22 THE COURT: You may.

23 THE COURT: Am I doing what you're wanting
24 me to do, Mr. Benjamin?

25 MR. BENJAMIN: Yes, Your Honor.

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1 MR. CASTELLANO: We're shooting for Monday
2 the 26th, Your Honor. That way we can also look at
3 the transcripts from Trial 1. I'm not sure when
4 those will be finalized. But that will give us time
5 to pull those from the transcript, if necessary.
6 That would be March 26.

7 THE COURT: Could you live with that, Mr.
8 Benjamin?

9 MR. BENJAMIN: For additional production
10 of --

11 THE COURT: What they're going to do is
12 they're going to get -- I guess, maybe Ms. Bean can
13 tell us, but they're going to get the final
14 transcript; they're going to scrutinize it, and see
15 if there is anything in the first trial that they
16 want to add to the list. And they'll notify you by
17 March 26, if there is additional statements that they
18 want to use the co-conspirator exception to the
19 hearsay rule, to use that as the basis for getting
20 the statement in.

21 MR. BENJAMIN: My gut reaction is:
22 respectfully no, Your Honor, because we had a James
23 hearing in December for those statements, and we know
24 what those statements are, or how the Government
25 intends to use those statements in this case. And

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1 then I think that dovetails into my concern with the
2 statements that came out in 1901 and 1903, and we're
3 working off 1903, Your Honor.

4 There is multiple items in the table -- and
5 the Government was overexclusive -- and I appreciate
6 that in this table -- but I guess it concerns me that
7 we've been waiting essentially since November for the
8 James hearing on Trial 2, and there is other
9 statements out there. And that's the way that my --
10 and I realize the Court hasn't had the opportunity to
11 read my pleading.

12 But that's the way that my pleading begins,
13 Your Honor, that in May 10th of 2017, Ms. Armijo
14 promised that there was a cooperator who was going to
15 identify the reason that Joe Gallegos was here in
16 Counts 4 and 5. And that didn't materialize. And
17 that hasn't materialized. And it's the shifting --
18 we promise to prove federal jurisdiction for the
19 murder -- and Your Honor, I don't know if the Court
20 remembers this, but we had a discussion with Ms.
21 Armijo and the Court regarding whether or not there
22 was any jurisdiction to lock Mr. Joe Gallegos into
23 Counts 4 and 5, and quite frankly, Count 13 -- which
24 is 4 and 5, is the murder of Adrian Burns, and Count
25 13 is the assault that's alleged on Jose Gomez, or

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1 Tiny.

2 And at this point in time, those three
3 counts have no federal jurisdiction. They are
4 straight -- for lack of a better term -- violent
5 crimes alleged by the Government that are only
6 punishable in the State of New Mexico. There is
7 nothing that ties those three counts to the
8 indictment, to the VICAR actions.

9 And so my concern is that we keep getting
10 this shifting target that I've been looking for for
11 two years now, Your Honor.

12 THE COURT: I understand those, and I'm not
13 trying to run away from any of those issues. But
14 hang in with me for a second on the James hearing and
15 the co-conspirator -- you've got their table?

16 MR. BENJAMIN: Yes, Your Honor.

17 THE COURT: We'll figure out how to
18 proceed, from the defendants' standpoint on that in a
19 moment, but can you live with the fact that they will
20 give you, by March 26, any additional statements out
21 of the first trial? I know we already had a hearing,
22 and so it may be that everybody is kind of aware of
23 what they're going to do -- but can you live with a
24 March 26 date for them to get -- I guess, a final
25 transcript -- go through it, and add any sort of

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1 statements out of the first trial onto this list?

2 Could you live with that deadline?

3 MR. BENJAMIN: When the Court phrases it
4 that way, Your Honor, I think, selfishly, for Mr. Joe
5 Gallegos, I can, be cause none of those statements
6 will affect Mr. Gallegos.

7 I see Mr. Burke out of the corner of my
8 eye --

9 MR. BURKE: We cannot live with that. That
10 is absurd in my view, Your Honor. They've known
11 about these statements, basically for years. We
12 don't need a transcript for them to identify them.
13 And when I read this sentence, "The United States
14 also reserves the right to introduce co-conspirator
15 statements introduced in Trial 1," I was thinking:
16 What right? There is no right. Reserving what right
17 was my question?

18 And really, if they're going to try to do
19 this, then the deadline should be Wednesday of this
20 week. So that they just tell us what the James
21 statements are that they're now going to try to slip
22 in with this sentence of: Reserving the right to
23 introduce statements introduced in Trial 1. And I
24 was here for a bunch of the trial, so I have a feel
25 for it. But most of my colleagues were not. And

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1 we've been trying to keep up, and we've trying to
2 keep everybody up to speed. But it's very difficult.
3 And it was a massive -- I'm telling you. So those
4 are my comments.

5 THE COURT: Well, I am concerned, Mr.
6 Castellano, about this. I do think today is the
7 James hearing, so I do need to put pressure on the
8 Government to identify its statements.

9 Could you live with a date, end of business
10 Wednesday, and if you need to supplement, then I'll
11 probably put an additional burden on the Government
12 to start justifying why it couldn't identify, but at
13 least give the defendants something by the end of
14 business on Wednesday as to statements out of the
15 first trial that you intend to use, the
16 co-conspirator.

17 MR. CASTELLANO: Your Honor, Mr. Benjamin
18 just agreed that he was here for the hearings in
19 December, and he's aware of the co-conspirator
20 statements. So it's not as if counsel wasn't here
21 for that hearing. They were here for that hearing so
22 they did hear the statements back in, I believe,
23 December.

24 He's acknowledged that. But I understand
25 the Court's ruling.

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1 THE COURT: I'm going to put a deadline:
2 End of business on Wednesday for the Government to
3 either file a letter, send a letter, or file a
4 pleading identifying additional statements out of the
5 trial, and really any other statements you're going
6 to give.

7 And after that deadline, if you're going to
8 try to get it in, if you find some other statements
9 you're going to have to start justifying why it
10 wasn't produced earlier.

11 The reality is that this is a trial, and I
12 try to put deadlines on the Government, but there may
13 be statements that come up that we have to deal with,
14 and of course, the Tenth Circuit recognizes that you
15 can do that in a trial -- and trying to front-end
16 load this as much as possible for the Court and the
17 Defendants' benefit, but you are going to have to
18 start rolling a little bit and being flexible to --
19 but I will require the Government to start justifying
20 why it wasn't identified before.

21 MR. BENJAMIN: Your Honor, I understand
22 that. And my concern is that Mr. Gallegos -- and I
23 think Mr. Andrew Gallegos' counsel wants to address
24 this -- we're not concerned about a statement and
25 whether he said that we got in the car or we got in

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1 the car with four kilos or got in the car with
2 something else like we normally deal with. I'm
3 talking about individuals, whole individuals, and/or
4 statements, that are tied to the jurisdiction for
5 three counts.

6 THE COURT: I understand that. I'm trying
7 to work through the James issue. I'm not running
8 away from the jurisdictional issue. But I guess I
9 need to deal with this James issue first. And then
10 I'll let you argue fully before, you know, we get
11 done about these jurisdictional issues. But they may
12 involve non James statements, they may involve
13 something else. So I'll put that aside just for a
14 second and try to work through this James issue.

15 MR. BENJAMIN: And, Your Honor, I
16 understand, and appreciate that. And once again, I
17 realize the Court has that -- but that's how my James
18 response opens up, is tying the James hearing to the
19 investigating individuals.

20 THE COURT: Okay. Ms. Torraco.

21 MS. TORRACO: Thank you, Your Honor. And
22 I'll be very brief, but I want to --

23 THE COURT: Let's do this: I've got to
24 give Ms. Bean a break. We've been going an hour, and
25 so I don't cut you short, why don't we be in recess

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1 for about 15 minutes, and we'll come back in and
2 resume the James hearing.

3 (The Court stood in recess.)

4 (The Court took the verdict from Trial 1
5 and a lunch break.)

6 THE COURT: All right. We'll go back on
7 the record. I left my robe somewhere in the
8 building. I won't be Bob Schwartz. We all like Bob.
9 I think I left it up in the visiting judges'
10 chambers.

11 MR. BURKE: Are you open for business, Your
12 Honor?

13 THE COURT: Yes.

14 MR. BURKE: I had a chance to look at the
15 plea agreements over the break. And just the
16 addendum need to be added to them, because the
17 document and any addenda become the complete
18 statement. So these will have to get the addenda.

19 THE COURT: Any objection to providing the
20 addendum, Mr. Castellano?

21 MR. CASTELLANO: No, Your Honor. The
22 addendum doesn't have any statements to it. We're
23 happy to add that if necessary.

24 THE COURT: If there is no objection, we'll
25 add those.

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1 MR. BURKE: Thank you, Your Honor.

2 THE COURT: Is there any objection? All
3 right. I know that the defendants didn't want them
4 in, but if they're coming in, then we'll add the
5 addendum to it.

6 All right. Well, let's continue to take up
7 the -- I've been reading during the lunch hour, and
8 this morning, so while the jury was meeting with the
9 attorneys I was continuing to read on some of the
10 latest motions. But let's go back to the James
11 hearing. Where do the defendants want to go on this?
12 I mean, I guess I could do this.

13 Oh, Ms. Torraco, why don't you go ahead.
14 You were up.

15 MS. TORRACO: That's okay. I like hearing
16 what you have to say first.

17 THE COURT: Well, I was going to say, as a
18 general rule, what I did in the first trial is I
19 said -- and I've read everything -- is let me go
20 ahead and say I think that the Government has
21 established a conspiracy. I probably need to be
22 enlightened a little bit, and see if there is any
23 argument on who the members of the conspiracy are, so
24 that I have each conspiracy down, I have who the
25 Government contends is in each conspiracy. And then

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1 it looks to me like they've made at least a prima
2 facie case that the statements that are being offered
3 were in the conspiracy, or done in furtherance of the
4 conspiracy, and during the conspiracy. But then
5 allow the defendants to come in and tell me that, no,
6 that the one is not. And then I can focus on it a
7 little bit more. Would be the approach that I would
8 propose.

9 But your thoughts, Ms. Torraco?

10 MS. TORRACO: Thank you very much, Your
11 Honor. And before the break I think there were two
12 issues. And I know you ruled on one of them, and
13 that was that the Government had represented that it
14 now wants to bring in statements that were offered
15 for Trial 1, and they kind of left that caveat to
16 also enter those statements in Trial 2.

17 And I would like to note Andrew Gallegos'
18 objection to that. And I believe Mr. Beck had said,
19 Well, you guys heard them all, everyone was here, so,
20 you know, you were on notice. And I would just like
21 to remind the Court that that was the first day that
22 I was on this case, is when we did that James
23 hearing. And at that time, the way that I recall it,
24 it was very clearly represented that it was a Trial 1
25 James hearing. And regarding Andrew Gallegos, there

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1 were times that we felt like we had something to
2 question, but refrained from cross-examination
3 because it was very clearly a Trial 1 issue. So I
4 want to just make that note for the record.

5 THE COURT: Well, I think you're entitled
6 to a body up here in the witness box to
7 cross-examine. So if you want it, the Government, I
8 think, is basically saying they agree. So they'll
9 put somebody up here if you want to cross-examine on
10 the table.

11 MS. TORRACO: Okay. Terrific. Because I
12 know that we do.

13 THE COURT: So if you want to do that now,
14 we can do that now. If the way I proposed to go
15 about is a good way to approach it, then for your
16 planning purposes, I can plan to have these
17 statements coming in. I can plan on there being a
18 conspiracy. We can agree on who the members are. I
19 can just make a finding, is probably the best way to
20 do it. But you can tell me where the real issues
21 are. I think -- and then you can have a witness to
22 question to -- I assume what the questions are going
23 to be directed to are: What is your evidence that
24 this is during and in furtherance of the conspiracy?

25 MS. TORRACO: Yes, Your Honor.

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1 THE COURT: Or there may be other issues.

2 MS. TORRACO: And I think to some extent,
3 at least from Andrew Gallegos' perspective, we are
4 not as clear -- I think the Court made a statement
5 that you're clear that the Government has made a
6 prima facie case. We are not as clear as to the
7 separate conspiracies, and we ask that the Government
8 make that showing, as long as, and in addition to
9 which of the defendants are members of which
10 conspiracy.

11 THE COURT: Yeah. What I mean by -- it
12 seems to me that, if you take what's in the plea
13 agreement, probably there is enough there to find a
14 conspiracy. And I would group them around the
15 different murders. So I would assume those are the
16 conspiracies the Government is going to prove is the
17 murder to kill Mr. Burns, the murder to kill Mr.
18 Castillo, you know, that those would be the
19 conspiracies. And then we need to be clear, that
20 means I have to find who is a member of that
21 conspiracy. And then we begin to focus then on the
22 statements to make sure that the declarant was a
23 member of that conspiracy, and that the statement was
24 made during and in furtherance of the conspiracy.

25 MS. TORRACO: Thank you, Your Honor. And

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1 the last thing is I just want to plant the seed, as
2 the Court goes through the evidence. I am very
3 concerned, as is co-counsel and Mr. Andrew Gallegos,
4 as to why he has been indicted on a 2012 racketeering
5 charge. And the Court is going to hear a lot of
6 evidence, or a lot of statements, depending on the
7 stage of the proceedings about 2001 murders. And I
8 am very concerned that Andrew Gallegos is going to be
9 tarnished by all of these past bad acts of the
10 co-defendants. And I just want to plant that seed
11 before we move on. Thank you.

12 THE COURT: Okay. Thank you, Ms. Torraco.

13 All right. So how do the defendants want
14 to proceed? If we're sort of in agreement on the
15 ground rules, tell me how the defendants would like
16 to proceed on this James hearing. Mr. Castle?

17 MR. CASTLE: Judge, just initially, I know
18 that when the Court had done James hearings in the
19 Trial 1, it also spilled into not just co-conspirator
20 statements, but issues concerning statements against
21 interests, and admissions by a party opponent. I
22 take it the Court only wants to deal with the James
23 right now.

24 THE COURT: Yeah. What I would propose to
25 do, if this would work for everybody, let's focus on

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1 the James statements, let's figure out what evidence
2 is going to come in as a co-conspirator. It's not
3 really an exception. But it's nonhearsay. So
4 fitting it in to Section E, and let's figure that
5 out. And then, if the Government still wants that
6 statement in, and y'all want me to rule, I will, but
7 you'll have to identify it. I assume -- I have not
8 finished reading Mr. Beck's brief that he filed
9 either yesterday or tonight or this morning involving
10 the statement against penal interests. But I had
11 ruled against the Government the first trial as to
12 Mr. Perez' statements. And so I didn't allow some of
13 that to come in that way. And it didn't -- about the
14 only effect I think it had was it didn't come in
15 against the other defendants. Because if it had been
16 nonhearsay there, it would have come in against
17 everybody, and I didn't allow that. I only allowed
18 the statements to come in against Mr. Perez. But
19 they're making another run at it to, I think, try to
20 get statements by some of the defendants to be
21 against all the defendants.

22 So what I would propose is let's focus on
23 the statements they've identified so far, statements
24 they're going to identify this week. And then, if
25 there are other statements, let's take them up one at

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1 a time, and I'll try to give you rulings on them.

2 MR. CASTLE: That makes sense, Your Honor.

3 The only thing I would request so we can
4 all proceed orderly, is that if they do have specific
5 statements against interests or admissions by party
6 opponent, that they want to introduce against a
7 defendant that isn't the declarant, that we have a
8 list of those so that we can work orderly through it
9 later this week. And I don't know if they could do
10 it by Wednesday, or if they can even identify the
11 pages that the stuff is on, so they don't have to do
12 anything formal. We'd asked for that informally from
13 them, but I'm not sure they've had the opportunity to
14 look at that.

15 THE COURT: Well, what do y'all think about
16 that, to make as many pretrial rulings as I can on
17 this, do you want to provide such a list?

18 MR. BECK: No, Your Honor. I think we
19 responded to this initially Halloween of last year,
20 as I'm looking at my chart, with Document 1389, that
21 we were not going to provide such a document. We
22 didn't do that in Trial 1, and it worked just fine.
23 I think the defendants know what's out there, and so
24 does the Government. And so, if we have problems, we
25 bring them up and there can be a ruling on it. If

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1 not, then we just go through trial. I think probably
2 a motion in limine that you're reading through right
3 now will give us good headway as to what's going to
4 happen there.

5 THE COURT: I think that I really don't
6 have a good basis other than -- I can probably order
7 anything, but I don't have a good basis other than
8 just brute judicial force to force the Government to
9 disclose those statements. But I do think that we're
10 probably going to have a pretty good list. If I
11 don't allow something in the co-conspirator
12 exception, I would bet you the Government is still
13 going to try to squeeze it into something. So we can
14 make a little list there and come back to it.

15 If y'all have identified any statements you
16 can bring it up and say: Would you rule on this one,
17 and I'll rule on them. But I probably -- you got a
18 lot because I did force them to do the James
19 statements, and I'm continuing to force them to get
20 those statements out. So you've got a pretty good
21 list.

22 MR. CASTLE: Your Honor, on behalf of Billy
23 Garcia, we attempted to do that. It's a targeted
24 motion which lists the statements. The only thing I
25 would just communicate, this trial is going to be a

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1 lot different than Trial 1. There are a lot of these
2 kind of statements out there. And if the Government
3 wants to just proceed on the fly, then we're going to
4 be stopping proceedings to voir dire a witness, to
5 find out is this really a statement against interests
6 or is this bragging. And it's really unfair to the
7 defense to have to do that in front of the jury,
8 because they'll wonder why you're asking all these
9 questions, open-ended question.

10 And so I'm not asking for anything right
11 now. But perhaps the Government might think about
12 that. And it would make the trial go a lot smoother
13 if we had rulings and we all knew these specific
14 statements. And I would just, you know, a remark
15 that the record on these statements are going to have
16 to be pretty significant because we're going to have
17 to talk about the confrontation arguments that we
18 brought up and reiterate those. We have to bring up
19 any of the hearsay objections, et cetera. So that's
20 what I was trying to do. We do have discovery, so we
21 do know what statements. Unless they are holding
22 anything back at this point, we pretty much know it.
23 And I thought while we're here -- but I understand
24 the Court's ruling. I'm just saying --

25 THE COURT: Do this for me: I'll try to

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1 make as many rulings -- I would prefer, just like
2 you, I'd prefer to have a moment to think about it.
3 I'd like to do it as much as I can in advance. So if
4 you see a statement, write it down, send me a letter,
5 I'll rule on it. If the Government says, Well, you
6 didn't have enough information and stuff, then, you
7 know, we might have to do some stuff out of the
8 presence of the jury or something like that. But
9 I'll give you every ruling I can. And you'll just
10 alert me to the statement, and try to keep it moving.

11 MR. CASTLE: That makes sense, Your Honor.
12 Yeah, as far as the procedure on the James motions
13 what the defense suggests is the Government first
14 address the Court, tell the Court what the various
15 conspiracies are, who the participants are. And some
16 of those participants are not going to be defendants
17 here. I noticed in their proffer, it might be people
18 that aren't defendants. So they would have to
19 identify not only defendants, but other participants
20 in the conspiracy that they're going to rely upon to
21 get statements in, and then tell us a bit of what the
22 time period is of this conspiracy, and whether
23 they're going to try to bring in evidence in the
24 course of, furtherance portion of it.

25 Once they define that, then we're going to

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1 have a lot better understanding and ability to refine
2 our questions to Agent Acee, which is who we would
3 put on to ask about this initially.

4 Just so the Court knows, we have been
5 informed over the weekend that the Government was
6 going to put on Agent Acee, instead of putting us in
7 this position of calling him. But I think it's just
8 another way to skin the cat, I guess.

9 THE COURT: All right. Well, let me talk
10 to Mr. Castellano a little bit and see. It would
11 seem to me, Mr. Castellano, it's a reasonable
12 request, both from the Court and from the defendants
13 for you to -- let's take these, tell me how many
14 conspiracies that you're going to try to establish in
15 the case, who you allege the members to be. Yeah, I
16 guess that's it. And that might help educate the
17 Court as well. I'm trying to get the counts,
18 defendants, and victims -- alleged victims -- down in
19 my head as well, so -- does that sound reasonable?

20 MR. CASTELLANO: Sure, Your Honor. Let's
21 give it a shot.

22 Let me start with the indictment, because
23 as we go through any reports or anything else, there
24 will be additional members of the conspiracy. For
25 example, someone may have passed the paperwork.

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1 Starting with the indictment, just in terms of
2 branding some of these conspiracies, so Count 1
3 involves the Castillo murder, and it's currently
4 charged as Angel DeLeon, Joe Gallegos, Edward Troup,
5 Leonard Lujan, and Billy Garcia. And I'll go back
6 and fill in the other blanks. But in terms of laying
7 out the framework, I'll give the Judge the initial
8 names.

9 So Count 2.

10 THE COURT: Let me get -- it was Joe
11 Gallegos.

12 MR. CASTELLANO: I'm happy to repeat any
13 names or go slower.

14 THE COURT: But it's Joe Gallegos; correct?

15 MR. CASTELLANO: That's correct. It's Joe
16 Gallegos.

17 THE COURT: Then Edward Troup.

18 MR. CASTELLANO: Yes.

19 THE COURT: And then, let's see, Leonard
20 Lujan.

21 MR. CASTELLANO: Yes.

22 THE COURT: So Mr. Lujan is the only one
23 that's not a defendant, and of course, Angel DeLeon
24 is a fugitive.

25 MR. CASTELLANO: That's correct.

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1 THE COURT: And you don't have any other
2 conspirators, either parties or nonparties, that will
3 be part of Count 1?

4 MR. CASTELLANO: I'm sure that we will,
5 I'll come back to those. I'm going to just get the
6 framework, then I'll go through some of the reports,
7 which will indicate additional people who, for
8 example, may have passed paperwork.

9 But nonetheless, the defendant in that
10 conspiracy as charged or that murder as charged is
11 Billy Garcia.

12 THE COURT: Right. Okay, then for Count 2?

13 MR. CASTELLANO: Count 2 is the Garza
14 murder.

15 THE COURT: So basically what you're doing
16 me is giving me indictment information here?

17 MR. CASTELLANO: I am for starters.

18 THE COURT: This is Mr. Garza; remind me
19 what Mr. Garza's first name is.

20 MR. CASTELLANO: Rolando, R-O-L-A-N-D-O.

21 THE COURT: And Mr. Castillo's first name?

22 MR. CASTELLANO: Frank.

23 THE COURT: All right.

24 MR. CASTELLANO: Frank Castillo was also
25 known as Pancho, in case that comes up on any of your

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1 reports.

2 THE COURT: Okay. Mr. Garcia, did he have
3 a name?

4 MR. CASTELLANO: Garza was Looney.

5 THE COURT: Okay.

6 MR. CASTELLANO: For starters, we have
7 Leonard Lujan.

8 THE COURT: I'm not looking at the
9 indictment. Does he appear as somebody's name is not
10 darkened, bold? It's just a co-conspirator? Is that
11 the way he's listed?

12 MR. CASTELLANO: Yes, Leonard Lujan was
13 initially charged in Counts 1 and 2. And he's now
14 pled guilty and the Court has his plea agreement.

15 THE COURT: Okay.

16 MR. CASTELLANO: Billy Garcia.

17 THE COURT: Okay.

18 MR. CASTELLANO: Eugene Martinez, who has
19 also pled guilty.

20 Allen Patterson.

21 THE COURT: All right.

22 MR. CASTELLANO: And Christopher Chavez.

23 THE COURT: Okay.

24 MR. CASTELLANO: Count 3 is Freddie
25 Sanchez.

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1 THE COURT: Okay.

2 MR. CASTELLANO: Javier Alonso is the first
3 person there, and he's pled guilty.

4 THE COURT: Okay.

5 MR. CASTELLANO: Next is Edward Troup.

6 THE COURT: All right.

7 MR. CASTELLANO: Arturo Garcia.

8 THE COURT: Okay.

9 MR. CASTELLANO: Benjamin Clark, who has
10 pled guilty.

11 THE COURT: Okay.

12 MR. CASTELLANO: And Ruben Hernandez, who
13 has also pled guilty.

14 THE COURT: All right.

15 MR. CASTELLANO: The next in Counts 4 and 5
16 is the conspiracy and the murder of Adrian Burns.

17 THE COURT: So these are going to be the
18 same?

19 MR. CASTELLANO: Yes. And those counts
20 involve Joe and Andrew Gallegos.

21 THE COURT: All right.

22 MR. CASTELLANO: That takes us to -- Count
23 13 does not have a conspiracy charge, so we can skip
24 that one for now. That's the assault with a
25 dangerous weapon of Jose Gomez.

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1 But Count 14 is a conspiracy --

2 THE COURT: Let me write that down so I
3 kind of begin to memorize these counts.

4 MR. CASTELLANO: So Count 13.

5 THE COURT: Is assault of Jose Gomez?

6 MR. CASTELLANO: Yes, assault with a
7 dangerous weapon upon Jose Gomez.

8 THE COURT: All right. So there is no
9 conspiracy connected with it?

10 MR. CASTELLANO: Correct.

11 THE COURT: All right. Then 14.

12 MR. CASTELLANO: 14 is conspiracy to murder
13 Jose Gomez. And in that count is Joe Gallegos;
14 Santos Gonzalez, who has pled guilty; Paul Rivera,
15 who has pled guilty; Shauna Gutierrez; and Brandy
16 Rodriguez, who has pled guilty.

17 THE COURT: Okay.

18 MR. CASTELLANO: And in Count 15 is the
19 attempted murder of Jose Gomez, which also includes
20 allegation of assault with a dangerous weapon
21 resulting in serious bodily injury.

22 THE COURT: Has that got the same cast of
23 characters as far as the alleged conspiracy?

24 MR. CASTELLANO: That's correct.

25 THE COURT: All right.

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1 MR. CASTELLANO: And the same applies to
2 Count 16, which is -- for shorthand, I'll just call
3 it "witness tampering."

4 THE COURT: And this is related to Jose
5 Gomez, the assault on him?

6 MR. CASTELLANO: Yes, sir, that's correct.

7 THE COURT: So it's the same conspiracy
8 there?

9 MR. CASTELLANO: Yes. Counts 14, 15, and
10 16 can be grouped together.

11 THE COURT: Okay. Tell me for my
12 edification what's the difference between 13 and 14
13 and through 16? What's the difference?

14 MR. CASTELLANO: Count 13 is an assault on
15 a different occasion.

16 THE COURT: Okay.

17 MR. CASTELLANO: That was on March 17th of
18 2015.

19 THE COURT: Okay.

20 MR. CASTELLANO: Then Counts 14, 15, and 16
21 are in February of 2016.

22 THE COURT: Okay. Those are the ones that
23 involve the machete?

24 MR. CASTELLANO: Yes.

25 THE COURT: All right. So now, going back,

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1 are there additional people -- as far as the Freddie
2 Castillo, are there additional co-conspirators that
3 you may use to get statements in other than the
4 people that are identified in the indictment?

5 MR. CASTELLANO: Yes, Your Honor. There
6 should be additional people. And some of those are
7 outlined in the table.

8 So let me start with the table. I'm
9 looking at statement number 11.

10 THE COURT: So you've got a declarant,
11 Angel Munoz?

12 MR. CASTELLANO: Yes.

13 THE COURT: And Angel Munoz, are you
14 alleging that he is a co-conspirator?

15 MR. CASTELLANO: Yes. Leroy Lucero
16 confirmed the message, and that's regarding the
17 Castillo and Garza murders.

18 THE COURT: Now, I wrote down that what was
19 in the indictment was Leonard Lujan. Is it Leonard
20 or Leroy?

21 MR. CASTELLANO: There are two people.
22 There is Leonard Lujan and then there is Leroy
23 Lucero, who is not listed.

24 THE COURT: Sorry, yeah. So is Leroy
25 Lucero a co-conspirator on this count?

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1 MR. CASTELLANO: I don't recall if he's a
2 co-conspirator. He is the one who confirms the
3 message, though, with Angel Munoz.

4 THE COURT: Why don't for the present
5 time --

6 MR. CASTELLANO: We should list him.

7 THE COURT: Should list him or should not?

8 MR. CASTELLANO: Let's list him for now.

9 THE COURT: Okay.

10 MR. CASTELLANO: Statement number 13 on the
11 table, Leonard Lujan met with Joe Gallegos, Angel
12 DeLeon, and someone identified as Criminal.

13 THE COURT: Is that Mr. Folsom, Kevin Folsom?

14 MR. CASTELLANO: I think he is known by
15 that, but this is probably a different person. Let
16 me see if I can find the name. He's identified by
17 the name or moniker of Criminal.

18 THE COURT: You don't think that's Folsom?

19 MR. CASTELLANO: I don't think so. Let me
20 double-check. That person is Michael Jaramillo, Your
21 Honor. Frederico Munoz should be identified as a
22 co-conspirator in the Garza and Castillo murders.
23 That's statement number 16 on the table.

24 THE COURT: Okay.

25 MR. CASTELLANO: Two more possible people

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1 are the Rascon brothers, Brian and Raymond. And this
2 is for the Freddie Sanchez murder.

3 THE COURT: Okay. So you don't have any
4 more co-conspirators for Count 1, other than stopping
5 with Frederico Munoz?

6 MR. CASTELLANO: I may have some more as I
7 move through the table, Your Honor. I tried to group
8 these as best as possible, but I know there are some
9 stragglers.

10 THE COURT: Okay. But the one you're
11 adding to Freddie Sanchez, Count 3, is Brian Rascon,
12 is that what you said?

13 MR. CASTELLANO: Yes, Brian and Raymond
14 Rascon.

15 THE COURT: And is Brian spelled B-R-I-A-N?

16 MR. CASTELLANO: Yes.

17 THE COURT: Then who is the other Rascon
18 brother?

19 MR. CASTELLANO: Raymond. I think for that
20 count we can also add possibly Benjamin Clark and
21 Javier Alonso. Benjamin Clark -- sorry, I've already
22 given you that name. But then you have Javier
23 Alonso.

24 THE COURT: Ben Clark is in the indictment;
25 correct?

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1 MR. CASTELLANO: That's correct. Also
 2 related to the Freddie Sanchez murder, in statement
 3 number 21 on the table, it's an unidentified person,
 4 so I put "first name unknown, last name unknown."
 5 That person sent word from green pod to the blue pod
 6 that if the murder wasn't carried out, other people
 7 in blue pod would be killed. So that's an unknown
 8 person who passed word from one pod to the next.

9 Okay. Going back to the Castillo and Garza
 10 murders, there are two other possible names. One is
 11 Willie Amador, spelled --

12 THE COURT: Let me ask you this: All the
 13 names that you gave me: Munoz, Leroy Lucero,
 14 Jaramillo, and Munoz, were those intended to be both
 15 part of the conspiracy for Freddie Castillo and
 16 Rolando Garza?

17 MR. CASTELLANO: I know that Munoz'
 18 statements are. And generally they were grouped
 19 together. I'll have to double-check that.

20 THE COURT: Should I be listing Leroy
 21 Lucero as somebody the Government thinks was part of
 22 the Garcia (sic) conspiracy?

23 MR. CASTELLANO: Castillo and Garza,
 24 G-A-R-Z-A.

25 THE COURT: Yeah, I'm sorry, I can't read

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1 my writing. Garza. So I need to move Leroy Lucero
2 over to Garza as well?

3 MR. CASTELLANO: Yes.

4 THE COURT: And Michael Jaramillo?

5 MR. CASTELLANO: Yes.

6 THE COURT: Hold on just a second.

7 (A discussion was held off the record.)

8 THE COURT: And how about Frederico Munoz?

9 MR. CASTELLANO: For both.

10 THE COURT: He's for both. All right. So
11 you were about to add, I think, somebody to, I guess,
12 the bottom of both Mr. Castillo and Mr. Garza's
13 conspiracies?

14 MR. CASTELLANO: Yes.

15 THE COURT: Who are those people?

16 MR. CASTELLANO: The first one is Willie,
17 W-I-L-L-I-E.

18 THE COURT: Willie, okay.

19 MR. CASTELLANO: Yes, Willie Amador,
20 spelled A-M-A-D-O-R. And Jesse, spelled J-E-S-S-E.

21 THE COURT: Hold on just a second. Let me
22 get it in both columns here. Then the next one is
23 Jesse --

24 MR. CASTELLANO: Jesse Ibarra, spelled
25 I-B-A-R-R-A. And that's for Castillo and Garza.

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1 THE COURT: Okay.

2 MR. CASTELLANO: These are all spelled out
3 on the table, Your Honor.

4 Next is we have a more specific statement
5 as to the Garza murder by Willie Amador. That's in
6 statement number 32. In that one Willie Amador tells
7 Eugene Martinez to serve as a lookout during the
8 Garza murder.

9 Now, there is, turning to the Freddie
10 Sanchez murder, there is a person named Kyle Dwyer,
11 K-Y-L-E, D-W-Y-E-R. He's one of the people who is
12 alleged to have passed paperwork regarding the
13 Sanchez murder. I noticed that one up because
14 passing the paperwork is an act; however, I image
15 there are some words relating to that act. I'm at
16 those words right now. I have to double-check with
17 the witness who gives us that information. But I'll
18 give the Court that in order to add him to the
19 conspiracy at least.

20 Okay. Turning to the Burns homicide. That
21 is a person known as Charlene, C-H-A-R-L-E-N-E; last
22 name, Baldizan, B-A-L-D-I-Z-A-N.

23 Someone -- I'm not sure he would be
24 considered a conspirator, but I will give the Court
25 another name as maybe potentially guilty of maybe

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1 helping to cover up the conspiracy. That person is
2 Jason; the next name is Van, V-A-N, and the next name
3 is Veghel, V-E-G-H-E-L.

4 THE COURT: Are you saying B as in boy, or
5 V as in --

6 MR. CASTELLANO: V as in Victor. Both
7 names have V as in Victor in them.

8 You have the names already, but statement
9 number 63 on the table, there are two people
10 identified as Cheeky and Coquito. I believe those
11 are the Rascon brothers.

12 MR. COOPER: Sorry, I didn't hear that last
13 part.

14 MR. CASTELLANO: In statement number 63
15 Cheeky and Coquito are identified in that statement,
16 but those are the nicknames for the Rascon brothers.

17 MR. COOPER: Which is which?

18 MR. CASTELLANO: I don't remember. Let me
19 check.

20 THE COURT: So the two Rascon brothers,
21 Brian and Raymond should be listed both under Freddie
22 Sanchez and Adrian Burns?

23 MR. CASTELLANO: No, in statement 63, those
24 are the Freddie Sanchez murder.

25 THE COURT: Oh.

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1 MR. CASTELLANO: When the Court sees those
2 names on the table, for example, on statement number
3 63, those two names refer to the Rascon brothers and
4 the Freddie Sanchez murder.

5 THE COURT: Okay. So don't move them over
6 to Mr. Burns?

7 MR. CASTELLANO: That's correct.

8 THE COURT: Just Freddie Sanchez?

9 MR. CASTELLANO: That's correct, Your
10 Honor.

11 THE COURT: Okay. Did you give everybody
12 the monikers for those two, and I just didn't hear
13 it? Who is Brian? Is he Cheeky, or --

14 MR. CASTELLANO: I always get them
15 confused, Your Honor. Let me check with the agent
16 and see if I can get the names lined up. Okay, Your
17 Honor, Cheeky is Raymond Rascon, and Coquito is Brian
18 Rascon.

19 THE COURT: Okay. And these are Freddie
20 Sanchez?

21 MR. CASTELLANO: That's correct. Related
22 to the -- in statement number 67, that's related to
23 the Garza murder. Potential names, not
24 necessarily -- one is Jimmie Gordon. I'm not quite
25 sure I'd quite call him a conspirator, but let's list

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1 him for now.

2 And the other one is Geraldine Martinez.

3 THE COURT: We're going back to Count 2,
4 the Garza murder?

5 MR. CASTELLANO: Yes.

6 THE COURT: So we're adding two names here,
7 we're adding Jimmie Gordon, and we're adding
8 Geraldine Martinez?

9 MR. CASTELLANO: Correct.

10 Another one, statement number 68 is not
11 tied directly to any of the charged homicides. The
12 Court actually heard this testimony in Trial 1. It's
13 that Billy Garcia had put a hit out on Gerald
14 Archuleta through Baby Zack. So it would count as
15 enterprise evidence. It wouldn't count towards any
16 of the charged -- well, it is related to the Castillo
17 and Garza murders. I should say the Castillo murder.

18 THE COURT: All right. So who is the
19 co-conspirator that you're relating to statement 68?

20 MR. CASTELLANO: Statement 68 is a
21 conversation where Baby Zack informs Gerald Archuleta
22 he's there to kill him at Billy Garcia's request.

23 THE COURT: So is Baby Zack a
24 co-conspirator --

25 MR. CASTELLANO: Yes.

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1 THE COURT: -- in the Castillo murder?

2 MR. CASTELLANO: No.

3 THE COURT: He's -- Baby Zack is a
4 conspirator in what?

5 MR. CASTELLANO: In a separate conspiracy
6 to murder Gerald Archuleta. It's a noncharged
7 conspiracy, but I went ahead and put it on the table
8 anyway. It's a co-conspirator statement, but it's
9 not a statement charged in this indictment.

10 THE COURT: Okay. So there is a new
11 conspiracy, and we'll call it the Archuleta?

12 MR. CASTELLANO: Yes, that's correct, also
13 known as Styx.

14 THE COURT: And his first name is Gerald,
15 Gerald Archuleta?

16 MR. CASTELLANO: Yes, Your Honor.

17 THE COURT: And this is uncharged. And
18 Baby Zack, remind me what his name is.

19 MR. CASTELLANO: I forget his first name.
20 He's Billy Garcia's nephew. And the Court heard
21 testimony at trial that part of this was a
22 confrontation at the methadone clinic.

23 THE COURT: Is his name -- last name also
24 Garcia?

25 MR. CASTELLANO: I don't remember. I will

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1 get that name to the Court.

2 THE COURT: All right.

3 MR. CASTELLANO: But it was related to the
4 Castillo murder, as it related to a disagreement over
5 Castillo getting murdered.

6 Now, related to the Sanchez murder, the
7 Freddie Sanchez murder --

8 THE COURT: Okay.

9 MR. CASTELLANO: -- another person
10 identified there is Jesse Trujillo. That person is
11 identified in statement 73 and 74 of the table.

12 Your Honor, let me check on one other name
13 right here.

14 THE COURT: You may.

15 MR. CASTELLANO: Thank you, Your Honor. I
16 was checking on another name.

17 Those are additional names I have on the
18 table. And all those statements will be on or about
19 the date alleged in the indictment.

20 THE COURT: All right. It looks to me
21 like, then, you're alleging there were six
22 conspiracies. If you want to quibble about the
23 number, go ahead, educate me. But it sounds like
24 you're alleging six conspiracies. I'll call that
25 Castillo, Garza, Sanchez, and then I'll put the 2, 4

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1 and 5s together, and that's Burns. And I'll put,
2 then, the Gomez three counts as one, and then you've
3 got the uncharged Gerald Archuleta. Is that a
4 fair -- six conspiracies?

5 MR. CASTELLANO: I think that's right, Your
6 Honor.

7 THE COURT: Can you think of any other
8 names that you will be advancing as co-conspirators
9 for any of these six conspiracies?

10 MR. CASTELLANO: I know that Joe Martinez
11 is one of them.

12 THE COURT: And where will he go?

13 MR. CASTELLANO: I think he may be part of
14 Freddie Sanchez. He's part of the Freddie Sanchez
15 murder, as someone who also passed or potentially
16 passed paperwork.

17 THE COURT: So his name is Joe Martinez?

18 MR. CASTELLANO: Yes. You heard about him
19 in Trial 1, also known as Cheech.

20 THE COURT: Okay. Any other
21 co-conspirators that can you think of?

22 MR. CASTELLANO: Not right offhand, Your
23 Honor. Once defense counsel gets up here, if I find
24 other names, I will tender those to the Court. But
25 that's what I have for right now.

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1 THE COURT: All right. It seems to me then
2 we've laid the groundwork. These are the
3 Government's allegations. It would seem to me that
4 now is the time for Mr. Acee to take the stand, and
5 then the defendants cross-examine him, A, about
6 whether -- what evidence he has that these names have
7 now been identified and the conspiracies that have
8 been identified; what the evidence is that the
9 Government is going to use to produce to prove that.
10 And then, if y'all want to tackle some of these
11 statements, go into those statements to see if you're
12 comfortable that they were during and in furtherance,
13 or do you want to get some information so you can
14 challenge it? Is that --

15 MR. CASTELLANO: Yes, Your Honor. We're
16 actually tendering Agent Stemo for purposes of the
17 James hearing testimony. She'll be the witness.

18 THE COURT: All right. Does that sound the
19 way we should proceed, Mr. Castle?

20 MR. CASTLE: So they're going to put --

21 THE COURT: They're going to give Ms. Stemo
22 to you.

23 MR. CASTLE: That's fine.

24 THE COURT: Then you can cross-examine her
25 about the conspiracies, whether these people are

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1 members, what the evidence is. And then, if you want
2 to take on some of these statements, then you can
3 question her about that.

4 MR. CASTLE: That's fine, as long as we can
5 call a witness, if we need to.

6 THE COURT: You're welcome to do that. All
7 right. Ms. Stemo, I think you're up. If you'll come
8 up -- you know where the witness box is. And, Ms.
9 Bevel, will swear you in before you're seated.

10 NANCY STEMO,

11 after having been first duly sworn under oath,
12 was questioned and testified as follows:

13 DIRECT EXAMINATION

14 THE CLERK: Please state your name and
15 spell your last name for the record.

16 THE WITNESS: Nancy Stemo, S-T-E-M-O.

17 THE COURT: Ms. Stemo.

18 Which one of the defendants are going to
19 lead off? Mr. Benjamin? Mr. Castle? Who wants to
20 go first?

21 All right. Mr. Benjamin.

22 MR. BENJAMIN: May I proceed, Your Honor?

23 THE COURT: You may.

24 MR. BENJAMIN: Thank you.

25 BY MR. BENJAMIN:

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1 Q. Agent Stemo, I think I'm going to -- and
2 this is just kind of for orientation, I'm going to
3 leave Counts 1 or 2 to some of the other counsel. So
4 I'm going to jump right to what the Court referred to
5 as the Adrian Burns conspiracy, okay? And that's
6 Counts 4 and 5 for the record; correct?

7 A. Correct.

8 Q. And that was a conspiracy to murder Adrian
9 Burns; correct?

10 A. Correct.

11 Q. And there were statements that were
12 produced by Charlene Baldizan, and did you take that
13 statement from her?

14 A. I did not.

15 Q. Are you aware of what that statement is, I
16 guess, or alleged to purport?

17 A. I have read it before.

18 Q. Okay. And the first one of those
19 statements is in Document 1903, essentially, the
20 attachment, the table, is what we referred to as
21 statement 43. That's says, "Charlene Baldizan agreed
22 to get rid of the van because the Gallegos brothers
23 knew the police were looking for it"; correct?

24 A. Yes.

25 Q. Who said that?

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1 A. Without looking at the report, I can't tell
2 you that.

3 Q. Okay. But it's attributed -- we -- do you
4 have the report with you?

5 A. I do not.

6 Q. Okay.

7 MR. BENJAMIN: Do you have a copy of the
8 report? Your Honor, may we take a break so she can
9 refer to the report? The statement, and if the Court
10 will refer to 43, is "Gallegos brothers."

11 THE COURT: Yeah, do you need somebody to
12 make a copy or something so she can look at it?

13 MR. BENJAMIN: Yes, Your Honor.

14 THE COURT: If you'll give it --

15 MR. BENJAMIN: I don't have -- my report is
16 digital, Your Honor. It's in the hard drive.

17 THE COURT: Anybody got a hard copy of the
18 report so I can copy it and give it to Ms. Stemo?

19 MR. CASTELLANO: I don't mind if he
20 refreshes her recollection from his computer, Your
21 Honor. I think he said he had it digitally.

22 MR. BENJAMIN: Your Honor, this is a new
23 one for me. And a James hearing is something where
24 she's the witness that's been proffered with
25 knowledge of this. The report doesn't state which

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1 brother.

2 THE COURT: Well, the Government has got
3 the burden of proof here. If they don't establish
4 that these people have -- are co-conspirators, then
5 they're going to lose. What do you need? Do you
6 need to get a copy to her? Does anybody have a hard
7 copy? If not, do you need to go down and print one?

8 MR. CASTELLANO: Let me see if I have it.

9 MR. BENJAMIN: Your Honor, there would be
10 multiple reports I'm going to print. I can think of
11 probably about six or seven in there.

12 THE COURT: Okay. It's your call. If you
13 want to take a break and go down and print them and
14 then give them to Ms. Stemo, we can. Or looks like
15 Mr. Castellano has got one. We can make copies.

16 MR. CASTELLANO: May I approach the
17 witness, Your Honor?

18 THE COURT: You may.

19 MR. BENJAMIN: Your Honor --

20 THE WITNESS: I've read the portion
21 regarding Ms. Baldizan.

22 BY MR. BENJAMIN:

23 Q. Okay. And that was one of the New York --
24 not New York -- New Mexico State Police supplements
25 that you referred to; correct?

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1 A. Yes.

2 Q. And who authored that report?

3 A. I believe that was Mr. Alvino Vigil.

4 Q. And the statement, "Charlene Baldizan
5 agreed to get rid of the van," and the rest of it was
6 made by which individual?

7 A. It does not clarify as to which Gallegos
8 brother told her that.

9 Q. Okay. And so she was never asked that?

10 A. I wasn't there, so I don't know.

11 Q. Okay. She has an hour and a half recorded
12 interview; correct?

13 A. She does.

14 Q. And that's not contained on that interview?

15 A. No, it's not. Agent Vigil refers to
16 another agent's report.

17 Q. Right. But we don't know -- this statement
18 is attributable to an individual; correct?

19 A. Correct.

20 Q. And so it's not that they made the
21 statement and parroted each other; it's one of the
22 two individuals?

23 A. I don't know.

24 Q. Right. And the -- do you know when the
25 statement was made?

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1 A. Tuesday, November 20, 2012.

2 Q. And it was made one time or multiple times?

3 A. I believe they spoke to her twice.

4 Q. But was it made one time or both times?

5 A. I don't know.

6 Q. And Charlene Baldizan, the Court referred
7 us to the conspiracy to murder Adrian Burns; correct?

8 A. Yes.

9 Q. She was not part of that conspiracy, was
10 she?

11 A. I don't think so.

12 Q. Okay. And her statement, she doesn't
13 actually ever say that she knew the police were
14 looking for the van, does she?

15 A. I don't think so.

16 Q. Okay. She refers generally to the idea
17 that she understood they were looking for the
18 Gallegos brothers?

19 A. Yes.

20 Q. And that's from news testimony -- not
21 testimony, from the news?

22 A. Yes.

23 Q. Okay. So to sum up, Charlene Baldizan
24 agreed to get rid of the van because the Gallegos
25 brothers knew the police were looking for it is not

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1 an accurate rendition of a statement that Charlene
2 Baldizan made?

3 A. I don't know. I'd have to watch the video
4 again.

5 Q. Have you listened to the audio?

6 A. I think I have.

7 Q. And that's not contained on it, is it?

8 A. No, not in this report.

9 Q. No, no. That statement is not contained on
10 the audio interview of Charlene?

11 A. I'd have to listen to it again.

12 Q. Do you know?

13 A. Not off the top of my head.

14 Q. Did you know you were going to testify
15 today to these statements?

16 A. I did not.

17 Q. That's the only statement that's being
18 attributable to Charlene Baldizan; correct?

19 A. That's in front of me, yes.

20 Q. Are you aware of any other statements that
21 Charlene Baldizan made in relation to the Adrian
22 Burns murder?

23 A. I am.

24 Q. Okay. Have you been offered -- do you know
25 if you're planning on using any other statements that

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1 were made by Charlene Baldizan?

2 A. I don't know that.

3 Q. Did you have any input in creating the
4 table that we've referred to?

5 A. I did not.

6 Q. And the entirety of Charlene Baldizan's
7 interview never mentions a gang; correct?

8 A. I don't think she mentions anything.

9 Q. And she specifically doesn't mention the
10 SNM or the Syndicato de Nuevo Mexico?

11 A. I don't think she does.

12 Q. And you're familiar with the Adrian Burns
13 investigation; correct?

14 A. Yes.

15 Q. There is no mention of the SNM in the
16 entire 36 supplements for -- actually, let me take
17 that back. In the first 35 supplements is there is
18 any mention of the Adrian Burns murder?

19 A. I'd have to check and get back to you.

20 Q. Okay. I think I misspoke. I said murder,
21 I meant SNM Gang.

22 A. I'd have to check and get back to you.

23 Q. Okay. Would you agree with me that it's
24 not mentioned, the SNM Gang is not mentioned up until
25 2015?

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1 A. I'd have to check and get back to you.

2 Q. But Charlene Baldizan does not make any
3 statement to induce enlistment or further
4 participation in a group activity; correct?

5 A. I don't think she does.

6 Q. Or to prompt further action on the part of
7 the conspirators?

8 A. I believe she mentions helping them get a
9 motel room.

10 Q. Helping -- she shows up at a motel room;
11 correct?

12 A. She does.

13 Q. But she specifically says that Loretta
14 Apodaca rented the room?

15 A. That could be true, yes.

16 Q. She gets very animated when she finds out
17 that she's the only one being charged, doesn't she?

18 A. I don't think that's true. I believe
19 Loretta Apodaca was also charged.

20 Q. Okay. But she gets -- she's upset that
21 Angela Gallegos is not charged; correct?

22 A. I believe she was also charged and the
23 charges were dismissed.

24 Q. The audio -- I'll skip that.

25 Are you familiar what the term "accessory

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1 after the fact" would mean?

2 A. Yes.

3 Q. That is the best way to describe Charlene
4 Baldizan primarily; correct?

5 A. I suppose so.

6 Q. Because she comes into this on the 20th of
7 November.

8 A. I believe she comes in earlier than that,
9 because this is the date they were arrested. I don't
10 know what she did or did not do prior to their
11 arrest.

12 Q. She doesn't come in on the day of the
13 murder or any other time other than when she says she
14 got called to go to the hotel in Albuquerque;
15 correct?

16 A. Not that I know of.

17 Q. Jason Van Veghel is the other individual
18 that we were told was a co-conspirator in the Adrian
19 Burns case; correct?

20 A. Yes.

21 Q. And he, essentially, has made several
22 statements regarding the murder; correct?

23 A. Yes.

24 Q. Okay. The first one, statement 44 says,
25 Joe and Andrew Gallegos asked Jason Van Veghel to

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1 clean up the living room and pull the carpet up and
2 gave him two to three hits of heroin for it. Joe
3 Gallegos also asked Van Veghel to clean the blood off
4 the air compressor; correct?

5 A. To that effect, yes.

6 Q. Okay. What do you understand his statement
7 to be, if it's not to that effect?

8 A. I believe Joe Gallegos actually woke up
9 Mr. Van Veghel, and gave him two to three BBs of
10 heroin, and asked him to clean up the living room and
11 clean up the carpet.

12 Q. Okay. And did Jason describe that carpet?

13 A. Not that I can recall.

14 Q. Okay. He doesn't describe that carpet to
15 the FBI?

16 A. He might have. It's not something that I
17 remember off the top of my head.

18 Q. Okay. And at that point in time, when that
19 statement -- do you know who took that statement?

20 A. Not off the top of my head.

21 Q. Do you know when that statement was first
22 made?

23 A. Not off the top of my head.

24 Q. Would it help you if you were to refer to
25 your notes?

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1 A. I don't have any notes.

2 Q. Would it help you if you were to refer to
3 the offense report?

4 A. Yes.

5 Q. Okay.

6 MR. BENJAMIN: Your Honor, I'd ask that the
7 agent be given an opportunity to refer to an offense
8 report.

9 THE COURT: She can. I don't have any
10 problem with her seeing it, but -- I'm sorry, what is
11 the defense (sic) report?

12 MR. CASTELLANO: Well, if the question is
13 when was that statement made, I believe Mr. Van
14 Veghel was awoken the day following the murder, so
15 that would be November 13. If that's Agent Stemo's
16 testimony.

17 THE COURT: All right. What are we
18 referring to when you say "defense report," what is
19 that?

20 MR. BENJAMIN: Offense report, not defense
21 report.

22 THE COURT: All right. And do you have
23 copies of that?

24 MR. BENJAMIN: They've been produced, yes,
25 Your Honor.

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1 THE COURT: I don't have a problem with her
2 reviewing it. This is a James hearing, so I don't
3 think there is any problem with her referring to
4 whatever she needs to get you the information you
5 need.

6 MR. BENJAMIN: The two issues I have first,
7 Your Honor, is that I understood that the agent that
8 was going to be proffered for the James hearing was
9 going to be prepared to testify about the statements
10 that were --

11 THE COURT: Yeah. I'm not impressed with
12 the preparation. So it may be the Government is not
13 going to meet their burden of proof. This is not
14 what we did in the first hearing. So I'm not being
15 overwhelmed by the Government's proof so far. But if
16 this is what they want to offer, it may work to your
17 benefit in the end.

18 MR. BENJAMIN: May I have a second, Your
19 Honor?

20 THE COURT: You may.

21 MR. BECK: Your Honor, I can respond to
22 that while they're taking a minute. It was our
23 understanding, based on my conversations with defense
24 counsel, Ms. Harbour-Valdez, with Mr. Castle, that
25 what we would do was argue today. It was our

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1 understanding that the table was going to be in lieu
2 of agent testimony. It was also our understanding
3 that if they were going to require the Government to
4 put on affirmative evidence in a James hearing, other
5 than the table, that would be done tomorrow, or this
6 afternoon, at the latest. But it was our
7 understanding that we were going to have notice if
8 they were going to require us to put on evidence.

9 THE COURT: Why don't you do this: I'll go
10 off the record in a second. I won't move. Why don't
11 y'all talk. If y'all had some agreements, I don't
12 want to upset those. But why don't y'all talk just a
13 second, you and Mr. Beck talk, and if you had an
14 agreement, fine; if you didn't have an agreement you
15 can tell me you don't have an agreement and I'll
16 rule. But I don't want to upset any carts here. So
17 why don't y'all talk a second, then let me know if
18 there is a disagreement.

19 MR. BECK: Sure.

20 (A discussion was held off the record.)

21 THE COURT: Let's go back on the record.

22 MR. CASTLE: Judge, in November, when the
23 first James hearings happened, the defense and the
24 prosecution agreed that we'd try to do something a
25 little more orderly for Trial 2. The prosecution was

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1 going to list the potential James statements well in
2 advance of the hearings. I think that they said they
3 were going to do it by February 20. We asked for
4 earlier. It didn't come in till March 7.

5 The defense teams have been scrambling to
6 go through those, and almost all of us, I think, have
7 filed motions indicating which ones we object to, the
8 grounds for that.

9 We were told over the weekend that one of
10 the prosecutors couldn't be here after Wednesday,
11 that had to be involved in this James litigation.
12 Because we had planned on having it later in the
13 week. I was asked if that could be pushed up forward
14 so that we could accommodate that person and the
15 prosecution team. We said we would. We were all
16 prepared, because we were told they were going to put
17 on their agent this morning, or today -- it could
18 have been this afternoon -- we didn't specify a
19 specific time. And in our motion -- the order that
20 we jointly submitted to the Court, we indicated that
21 the James presentation would be today.

22 So the Government doesn't agree with that.
23 They think that we agreed to some other process. But
24 we've been scrambling to make up for their lack of
25 diligence throughout this proceeding. I understand

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1 they had another trial, but they decided to prosecute
2 this case with this many defendants. And they
3 decided during that first trial that they would
4 abandon their obligations for Trial 2. And now they
5 come here today not prepared to proceed, and I think
6 we just need to proceed at this point on these
7 matters. And so that's our position.

8 I talked to them to try to work out a
9 resolution so we wouldn't have two different
10 proposals to the Court on behalf of all the other
11 defendants. But I can tell the Court we were all
12 surprised when the Government said they weren't
13 calling a witness today because we expected that to
14 happen on the specific statements that we were
15 objecting to, and we all outlined those objections in
16 the last week or so.

17 So that's the record we'll make. I like to
18 make agreements with people, but I would never have
19 agreed that they wouldn't have to put on any
20 evidence, Judge. I think the Court has seen my style
21 throughout these proceedings. I don't think my style
22 is: Don't put on any evidence, just bring the
23 evidence in wholesale.

24 THE COURT: All right. Any other -- before
25 I hear from you, Mr. Beck, any other defendant want

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1 to speak on the agreement, so can I figure out how to
2 proceed?

3 All right. Mr. Beck.

4 MR. BECK: So this is the proposed
5 scheduling order that I think was sent to Ms. Wild
6 Friday afternoon, and then again Friday evening. I
7 think Ms. Koch supplemented that at some point. So
8 we have the initial nonevidentiary arguments on
9 Monday morning.

10 THE COURT: So what I'm looking at is an
11 email from Laura Koch who, I guess, is Mr. Castle's
12 paralegal. Is that Koch or Coke?

13 MS. KOCH: Koch.

14 THE COURT: And it's dated at 1:13 p.m.
15 Are we looking at the same thing, Mr. Beck?

16 MR. BECK: I'm looking at the attachment to
17 that email.

18 THE COURT: But that's what we're all
19 looking at?

20 MR. BECK: That's right, Your Honor.

21 So the first thing: Nonevidentiary
22 arguments is the notice for James hearing. So that's
23 nonevidentiary. Then, again, we have a lot of
24 arguments that come through the day, none of which
25 we've gotten to. And then on page 2 -- and I'll zoom

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1 in on this language, where it says, "Any presentation
2 of Government James evidence here." And so --

3 THE COURT: "Any presentation of Government
4 James evidence here," and that would follow --

5 MR. BECK: That would follow, I think, the
6 arguments and the motions to sever.

7 THE COURT: To sever.

8 MR. BECK: So I believe that the agreement
9 was -- and certainly my subjective part of the
10 agreement was -- if the defendants were going to
11 require us to put on, quote, "any presentation of
12 Government James evidence" --

13 THE COURT: That's where it was going to
14 go?

15 MR. BECK: That's where it was going to go.

16 THE COURT: And they had the ability to put
17 on their presentation later in the week?

18 MR. BECK: Right.

19 THE COURT: Is that because of getting
20 witnesses here?

21 MR. BECK: Right, Your Honor, yes.

22 So, to the extent that they were going to
23 ask us to put on evidence, I anticipated that they
24 would ask us. And I think to be fair, I think Mr.
25 Castellano is ready to do that with Special Agent

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1 Stemo, to go through direct examination and provide
2 her with these reports so that she can testify to the
3 same information on the table.

4 There was no table provided in the first
5 trial. And that way, we just presented all the
6 information through Special Agent Acee.

7 And in this trial we agreed to put a table
8 together in lieu of having examinations, having
9 affirmative evidence from Special Agent Acee, or
10 Special Agent Stemo. But again, if we're going back
11 on that, we can, that's fine; Special Agent Stemo can
12 testify to the information that we've provided in the
13 table.

14 So I just don't want there to be any
15 confusion what at least the United States'
16 expectation of this agreement, filed by Mr. Castle in
17 the scheduling order, was.

18 THE COURT: Well, tell me how you
19 envisioned the James hearing taking place. I guess
20 I'm trying to figure out how we can have a James
21 hearing legal arguments before we have the
22 evidentiary portion of it. I guess I'm not seeing
23 how you have arguments before you have the evidence.
24 So what were you envisioning?

25 MR. BECK: I think, sort of, we

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1 short-circuited it a little bit before we started the
2 James hearing by asking whether the Court was going
3 to make us produce a list of 804(b)(3) statements
4 against interests, admissions by party opponents,
5 things like that. I think that was going to be the
6 argument with the motion in limine, was whether those
7 things come in. I think what we envisioned here, if
8 necessary, was that we would argue those things out.
9 If the Court was inclined to make us produce that
10 list, we would do that, so that later on they could
11 present their witnesses whom they wanted to call to
12 rebut the James statements, the admissions against
13 party opponent, the admissions against penal
14 interests. And that's why we put their witnesses
15 down the road because of subpoenas and things like
16 that.

17 I think -- I guess --

18 THE COURT: Did I do something that
19 short-circuited what y'all were trying to do?

20 MR. BECK: No, not necessarily. I mean, I
21 think we're getting there. I think where things got
22 caught up is that Your Honor was asking to just go
23 straight forward with the James hearing, which is
24 fine. I think the parties just had a little
25 misunderstanding of how that was going to play out.

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1 I think that -- I think that from our perspective,
2 what Mr. Benjamin was doing was according to the
3 agreement, and proper, was that he was looking at
4 statement, for instance 43, and saying: There is
5 nothing in the reports that indicates which Gallegos
6 brother she's referring to, and it's not even clear
7 that this witness was part of the conspiracy. And so
8 he is attacking what we put forth on the table as
9 proper evidence. And it's perfectly proper for him
10 to do so. I just think that maybe we weren't -- all
11 counsel weren't ready with the reports that the
12 witnesses would have needed to look at to refresh
13 their recollection. So I think that it's just the
14 case of not having the documentary evidence.

15 And I think the intention from everyone on
16 both sides was admirable and right, that we put this
17 list out so that they could attack the statements
18 they didn't believe came in. And I think we're
19 proceeding about that in a fine way. I just think
20 that we weren't quite ready to -- at least for us to
21 provide the reports to Special Agent Acee -- excuse
22 me, Special Agent Stemo. Sorry.

23 And so, if that's the way we're going to
24 proceed, I think that that's a fine way to do it. I
25 think that it's an expedient way to do it. I think

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1 it's a proper way to do it. But I just don't want
2 the impression here from the Court to be that the
3 United States didn't put on some affirmative evidence
4 for a James hearing purpose, and that the United
5 States is in some way unprepared or underwhelming the
6 Court. I don't want that impression.

7 THE COURT: Well, I guess here's the
8 impression I have: It seems to me that the
9 Government has given a fair amount of information as
10 to statements, conspiracies, and as members of these
11 conspiracies. And they put in evidence to establish
12 the conspiracies. I'm a little shaky on whether it's
13 been established that all these people are members of
14 the conspiracy. And some of the statements, when I
15 read them, I'm struggling to see how they were during
16 or in furtherance of the conspiracy.

17 But I do think the Government has put a
18 fair amount in. It's done differently than the first
19 trial and done differently than some of the James
20 hearings I've had. What I guess I'm concerned about
21 is I'm not hearing the sort of familiarity with the
22 evidence that I heard with Mr. Acee from Ms. Stemo.
23 And I'm wondering if we're going to get a sort of
24 robust record here that I think you need to get this
25 stuff in, and I need to make a decision, and the

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1 defendants feel like they're getting information. So
2 I think that's -- I'm speaking for myself, that seems
3 to be the sticking point, that we're not getting the
4 sort of familiarity of the record from Ms. Stemo that
5 we got from Mr. Acee in the first trial.

6 MR. BECK: Right. And that's why I was
7 going back and showing what brought us here.

8 But what I'm also saying to the Court is, I
9 don't think that's necessary a reflection on all the
10 James statements.

11 THE COURT: Let me ask this: If the
12 defendants get what they want from her, whatever she
13 can give them, and they call, then, Mr. Acee, any
14 problem with that?

15 MR. BECK: I don't think so. I don't know
16 that he'll have more familiarity with it. I think
17 that the way it's proceeding here is, as I said, an
18 expedient way to deal with this process. Because
19 they have the statements in front of them. Mr.
20 Benjamin has now picked out one or two that he thinks
21 don't meet the exception, and he's attacking those.
22 And so when Special Agent Stemo says, "I'm not
23 familiar with whether she was a member of the
24 conspiracy, when she joined. I'm not familiar with
25 whether SNM is mentioned in those," that's something

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1 for us to clean up on redirect. And if we don't, it
2 seems like it's not admissible as a co-conspirator
3 statement.

4 So I understand the Court's concern because
5 it's different than how we did it in the first one,
6 but I don't think it's necessarily a bad thing. I
7 think that we're getting to the heart of where the
8 contentions on these are. So, as I said, I think
9 it's more of, just a question of having the documents
10 ready to go, and we can do that now that we've got an
11 idea of where they're attacking these.

12 But I just don't want the Court to think
13 it's a reflection on the United States not preparing
14 its case or anything like that. I think the
15 procedure that we worked out in the beginning is
16 actually working here. And so I think, based on what
17 I just saw from Mr. Benjamin, he's looked at the
18 statements, he's prepared some that he thinks he can
19 attack and exclude as co-conspirator statements. And
20 I think we're getting to the heart of that. So I do
21 think that this process is working.

22 THE COURT: Okay. All right. Thank you,
23 Mr. Beck.

24 Mr. Castle.

25 MR. CASTLE: Yes, Your Honor, the burden to

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1 show the applicability of an exception to the hearsay
2 rule is on the proponent of the evidence. The
3 Government came here today -- and by the way, that
4 indication of presentation of evidence, that's on the
5 Monday schedule, so it was scheduled for today, even
6 though it was on page 2, it was still Monday. But
7 they came here and they said, We're going to do that,
8 Your Honor.

9 THE COURT: But it seems to me that the
10 agreement that was reached, if I just look at it,
11 they don't have an obligation to put on, I guess,
12 their interpretation of -- which may be even more
13 narrow than what the language is. They don't have to
14 present a live witness until after we argue the
15 motions to sever. They don't have any problem with
16 you having Ms. Stemo up here, but they don't have any
17 obligations to put up any witnesses until later. So
18 they've done more than what it seems they've agreed
19 to do on the paper.

20 MR. CASTLE: I'm a bit confused, because I
21 think motions to sever are something completely
22 different. I think the Court said at the beginning
23 of the hearing --

24 THE COURT: When you look at this chart, it
25 says at the top, "Any presentation of Government

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1 James evidence here," which would be after the
2 motions to sever. And then it says, "With defense
3 James presentations later in the week."

4 MR. CASTLE: The defense presentations.
5 And so what I think has happened here is they did do
6 their presentation. They presented the Court with, I
7 think, eight exhibits that they wanted the Court to
8 rely on. Then they made a statement on the record
9 about the different conspiracies. And at that
10 point --

11 THE COURT: Well, they also gave us a
12 table.

13 MR. CASTLE: They gave us a table, right.

14 THE COURT: I mean, that's pretty huge,
15 isn't it?

16 MR. CASTLE: It's helpful. I think it is.
17 I'm not sure it satisfies all the elements.

18 THE COURT: That was originally what the
19 defendants wanted. They wanted that table. And so,
20 unlike the Trial 1 defendants who wanted Acee on the
21 stand, and got him promptly, y'all got the statement.

22 MR. CASTLE: Well, I think if the Court
23 goes back in time, what happened was the Government
24 wasn't ready for those James hearings either. So the
25 defendants in Trial 1 didn't want to delay

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1 admission -- didn't want to have rulings much later
2 in the proceedings, in January, or whenever they
3 might be, so they elected to go ahead and go forward
4 with it.

5 What I'm just saying, if this is what the
6 Government is going to rest on, then we can proceed
7 in that fashion. And we may not have any questions
8 for Agent Stemo. I find it ironic they said: We're
9 ready to present this evidence through Agent Stemo,
10 but yet she testified a few minutes ago she wasn't
11 prepared to testify in this matter today. So if
12 they're going to rest on that, I think the defense
13 can then decide whether they want to put on any
14 evidence.

15 THE COURT: Let me do this: I'll give
16 y'all the choice, and we're coming up on the break,
17 so y'all can spend a little bit of time discussing
18 it. It seems to me that, given the agreement as I
19 see it, you can continue to take Ms. Stemo and do
20 what you want with her. And it sounds like, if you
21 want to call witnesses, you can.

22 If you want to not do that at this time,
23 then we can go to the other motions that we set for
24 Monday. And then I guess, after we get through with
25 the motion to sever, whenever that's going to occur,

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1 then the Government does have an obligation to put on
2 whatever it wants, and that probably is where it's
3 frozen. I'm a little reluctant to freeze it at the
4 present time given that in bold on page 2. But I'll
5 freeze it after we get through with the motions to
6 sever. And then y'all can call witnesses then or
7 call them later. And whenever y'all are done, I'll
8 give the Government a chance for any rebuttal, and
9 then we'll have arguments.

10 So it seems to me it's y'all's call. If
11 y'all want to still talk to Ms. Stemo, that's fine.
12 It doesn't sound like the Government may call anybody
13 but her, and they may not even call her, they may
14 just rest on what they've done.

15 MR. BENJAMIN: And, Your Honor, at this
16 point in time, based upon the way that this has been
17 moving forward this morning -- or sorry, this
18 afternoon, I guess -- I believe -- I don't know if I
19 can speak for all the defendants, but we would rather
20 move on to the rest of what's on the docket for --
21 and then could we have a minute to talk?

22 THE COURT: Yeah. And I assume if they
23 decide to move on, y'all don't have any objection
24 from the Government, Mr. Castellano?

25 MR. CASTELLANO: That's correct, Your

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1 Honor.

2 THE COURT: Mr. Beck? All right.

3 MR. BENJAMIN: Did the Court suggest it was
4 going to take a break, we could talk during the
5 break, and then --

6 THE COURT: If y'all want to let me know,
7 and then if y'all know what you're going to do. Talk
8 a second here, then if we need to take a break,
9 we'll take a break.

10 (A discussion was held off the record.)

11 MR. BENJAMIN: Thank you, Your Honor. The
12 defendants as a group would prefer to move on to any
13 motions and then let the Government, on their
14 schedule, resume and put on their testimony.

15 THE COURT: All right. So we will do that.
16 So when we come back in, we will take up -- I'm a
17 little confused by this motion, so it will be what
18 Ms. Wild had tabbed as 27. But it is Mr. Garcia's
19 motion to prevent admission of statements of
20 nontestifying co-defendants implicating Mr. Garcia,
21 and for an order for the Government to specify such
22 statements prior to trial.

23 I guess I'm trying to figure out how we're
24 getting in statements of nontestifying co-defendants.
25 Maybe that was through -- it would seem to me if all

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1 the statements are identified in the James statement,
2 if they're trying to get them as co-conspirator
3 statements, then they're going to have to already be
4 identified in the James statement.

5 So I'm not sure what else I'm being asked
6 to order. And then I guess I can't blanket deny
7 their admission. So I'll need to be educated on this
8 motion. But it seems to me that once they have
9 identified with the James statement all the
10 statements, they've done half of what's requested,
11 then I'm not inclined to require them to produce
12 anything other than James statements.

13 But let's take it up after the break. So
14 we'll be in recess for about 15 minutes.

15 (The Court stood in recess.)

16 THE COURT: All right. So I guess we have
17 the motion from Mr. Garcia. Let me -- before you
18 speak, Mr. Castle, let me make just a couple more
19 comments, and I may have a question of the
20 Government. While I'm not inclined to require the
21 Government to create some new document specifying
22 statements before trial other than what we already
23 have with the table on the James statements, can I
24 have this representation from the Government that you
25 do not intend to elicit any other statements other

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1 than what is in the discovery or in this chart?

2 I mean, it would seem to me that I might
3 run into some Bruton problems. I might run into just
4 problems, evidentiary problems, or something, if I
5 don't have the universe nailed down.

6 MR. BECK: So I think you have the
7 universe, with a small exception to that. And that
8 is, as the Court's well aware in the first trial, as
9 we start preparing for these trials, and meeting with
10 our anticipated cooperating witnesses --

11 THE COURT: They tell you more stuff.

12 MR. BECK: -- oftentimes --

13 THE COURT: Could we have this agreement,
14 then, that if it's not on your table, your James
15 table, and if it has not been produced in discovery,
16 we will not hear it in trial unless you send a letter
17 to the attorneys for the defendants. And then we can
18 argue at that point whether it's timely, should be in
19 or out as far as that. But I think everybody has to
20 recognize that, as we get closer to trial, testifying
21 witnesses are going to say more things, and that's
22 just the reality of it. But you will send a letter
23 promptly listing those statements that are not in the
24 current discovery.

25 MR. BECK: Yeah. I think what we'll do --

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1 I would assume most are familiar with this, but some
2 aren't. What happens when we run into new statements
3 when we're talking to cooperating witnesses, what
4 we've done is put them in a letter, and provide that
5 letter to all defense counsel as soon as possible,
6 and file a notice attaching that letter on the
7 docket, so that the Court also has notice of that.
8 And that way we can bring it to -- anyone who wants
9 to can bring it to the Court's attention as soon as
10 possible if the parties can't work it out. But we
11 will endeavor to provide notice to defense counsel as
12 soon as we are on notice of those new statements, if
13 there are any.

14 THE COURT: Okay. All right. Thank you,
15 Mr. Beck.

16 Mr. Castle, it would seem to me that I
17 probably will not require any other creation, because
18 it seems to me that gives safeguards as to giving me
19 some time to think about any particular statement,
20 but it also gives you some protection. And then I
21 guess the -- and I'm not trying to cut you off. You
22 can argue whatever you want -- but then on the motion
23 to prevent the admission of statements of
24 nontestifying, it would seem to me that then the
25 burden shifts to the defendants: Tell me what you

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1 want me to consider, either list for me or tell me
2 orally: Here's a statement that the Government is
3 trying to get in, and we don't think it should come
4 if, and here's the reason. What do you think about
5 that procedure?

6 MR. CASTLE: I think that that's what the
7 Court had anticipated a long time ago. I think when
8 Mr. Chambers was arguing about just generally Bruton
9 issues, the Court had indicated that when we got
10 closer to trial, that it would look at statements
11 individually. If the defendants, you know, had more
12 targeted litigation, I think that was the term,
13 that's why we put it in our motion.

14 So I think that even though I'd like the
15 list, I know the Court has already ruled on that, I'm
16 not going to reargue it, but I think the defendants
17 are on notice now to file motions to suppress, or
18 whatever you want to call it, concerning specific
19 statements. And I think some of them are on the
20 agenda for this week. So I'm not going to reargue
21 the issue.

22 THE COURT: Okay. All right. So I'm
23 willing and eager to handle and decide as many
24 statements as I can pretrial. Just bring them to my
25 attention, and I'll try to work with you on getting

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1 those out.

2 MR. BURKE: Your Honor, I did want to say
3 something about these pretrial interviews with the
4 government witness. And although the Court just said
5 that's the reality, that they'll remember something
6 new, and Mr. Beck said: We don't know what else
7 they're going to say, I personally have never seen so
8 many additional things being remembered during the
9 last-ditch pretrial meetings. And I -- so it's not a
10 reality to me that something new will come up a week
11 before trial because, you know, they're now
12 interviewing the informants again.

13 I suppose, if they get the 213-question
14 questionnaire, which is really a script for how they
15 might get additional points for cooperation, then
16 they might think of something else to say. And I'm
17 wondering if the defense could be present during the
18 pretrial interviews with the informants, so we're
19 right there at the time that new remembrances occur.

20 THE COURT: Well, I don't think there is
21 probably anything that really allows me or requires
22 me to do that. And I'm sure the Government is going
23 to object. I should ask, I guess, first.

24 MR. BURKE: But they're here to do justice.

25 MR. BECK: Yes, Your Honor, the United

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1 States objects. And it's not that they're
2 remembering new things. It's that they haven't been
3 asked about it before.

4 THE COURT: Well, I'm afraid I really don't
5 have anything other than just sheer judicial brute
6 force to order it, and I've declined to do that.

7 MR. BURKE: Yes, sir.

8 THE COURT: Thank you, Mr. Burke.

9 All right. Okay. Anything else anybody
10 wants to say then on the motion 1307? I've laid out
11 a procedure how we're going to proceed, and I'm eager
12 to help you deal with that. But I think we're going
13 to have to be real specific, so -- all right, not
14 hearing anything, does the Government want to say
15 anything on that motion? Comfortable with the
16 procedure I'm laying out?

17 MR. BECK: Yes, Your Honor. I'm assuming
18 we're going to save the discussion of the motion in
19 limine you were reading this morning for later. I
20 thought that that might come up in this. But we can
21 do that later.

22 THE COURT: I've been reading it off and
23 on. But I went to some other stuff. I started
24 reading the defendant's, Mr. Gallegos', response to
25 your motion on the proposed Jencks statements. So

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1 refresh my memory as to what I was reading this
2 morning.

3 MR. BECK: That's the admissions against
4 penal interests. But as I said, it was a motion in
5 limine that was filed over the weekend. The
6 defendants haven't responded. So I think if it
7 didn't come into play yet, it's probably better set
8 at the end of the hearing so that if people do want
9 to respond in a written fashion, they can.

10 THE COURT: And I'd like to read it a
11 little better.

12 MR. BECK: I would like for you to do so
13 also.

14 THE COURT: I was trying to read it while a
15 lot of stuff was going on this morning, and I'm not
16 sure I was doing it justice.

17 All right. So I think the next motion that
18 is up is what I understand the United States' notice
19 of request to proceed with the hearings on the
20 motions to dismiss. And I think this is largely, if
21 I understand it, a request to basically grant a
22 protective order as to two U.S. attorneys.

23 This might be a good place for me to just
24 give you my thoughts on the motions to dismiss, and
25 then we can begin to break it down. Because, if I

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1 understand from Ms. Wild, the -- let me put these
2 down so I don't get my papers out of order -- my
3 understanding from Ms. Wild is that the motions to
4 dismiss are going to take about four days, so they're
5 a big item, big ticket item for everybody.

6 I am not ruling, but I did read everything.
7 I read every attachment related to the motion to
8 dismiss. And so unless it's some material that came
9 in just recently that's been handed to me -- and a
10 fair amount has kind of roared in here at the very
11 end, so there is a stack here to read -- I feel like
12 I have read everything on the motions to dismiss.

13 Let me give you my impression of this case,
14 because I'm not precluding any evidence, and I'm not
15 ruling, but I do think it's fair to give everybody my
16 thinking after reading all this. I do think the
17 defendants have an uphill battle in trying to get me
18 to dismiss the counts here for preindictment delay.
19 The standards are very high, as the parties point
20 out. Here's my perception of what took place, and so
21 if you want to use your time in the hearings to
22 disavow.

23 And this goes back to my very earliest
24 involvement in the case, when Judge Gonzales decided
25 to come off the case. At that time, I was -- as I

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1 was coming into the case about the only thing I had
2 to read were motions to disqualify him. And attached
3 to that was all the motions in the U.S. Attorney's
4 Office of their investigation over the years, during
5 the time that Judge Gonzalez was at the U.S.
6 Attorney's Office. So my earliest impressions of
7 this case were formed, and to a certain degree I
8 think the defendants, if they're going to succeed on
9 their motions to dismiss, are going to have to
10 overcome my earliest impressions of reading in this
11 case.

12 My impressions from reading those earlier
13 302s, reports that the attorneys were doing, the
14 things that the Assistant U.S. Attorneys, that Mr.
15 Gonzales was seeing -- Judge Gonzales now -- was that
16 the United States didn't want to have anything to do
17 with the SNM Gang. They went out of their way to try
18 to tell the State of New Mexico: No; it was their
19 problem. And that the State of New Mexico, I think,
20 felt like that they couldn't handle the gang, and
21 they couldn't handle, from either resource standpoint
22 or whatever, they couldn't handle the SNM Gang. They
23 kept coming back to the United States to try to get
24 them to take this case. And it seems to me that
25 there is a fairly consistent thread through the file

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1 of the Government that they didn't want to do this.
2 They did not want this case. They didn't want SNM.
3 They didn't want to put the resources to it. They
4 thought it was a State of New Mexico problem, until
5 Mr. Baca and others ordered the hit on
6 Mr. Santistevan and Mr. Marcantel.

7 And at that point, there was a recognition
8 by the United States that the State of New Mexico
9 could not control the situation. It didn't have the
10 resources. It was -- I'll use my words: Out of
11 control. And they stepped in and they brought this
12 racketeering case.

13 And the decisions that they made in
14 bringing the racketeering case, we can call them
15 tactical, we can call them strategic, but it is the
16 way you put together a racketeering case. They
17 didn't have any interest in bringing murder cases.
18 They wanted to -- but once they bit, once they
19 decided that they needed to come in and help with the
20 state, then they began to put together a racketeering
21 case.

22 I certainly have ruled for discovery
23 purposes that since Marcantel and Santistevan were
24 part of this case, that the State of New Mexico
25 clearly wanted the feds to bring this case, that for

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1 discovery purposes, they were one and the same from
2 the time I got the case. They were melded together,
3 and that they needed to be treated that way for
4 discovery purposes. And nothing has changed on that
5 score. Although, now that the verdicts came in this
6 morning, there may be a lessening of their desires on
7 that. But I probably will not reconsider anything
8 that I've done. I think for purposes of production,
9 we made our rulings, and we'll stick with them on
10 their part.

11 But I think it's unfair to go back into
12 pre-2015 -- I don't know where exactly the cutoff
13 is -- and treat the Corrections Department and the
14 Department of Justice as one and the same. And so,
15 to me, to tell the Government that they have engaged
16 in preindictment delay is not something that I'm
17 inclined to do. And the State just didn't prosecute
18 it. So there is not a delay on their part, they just
19 didn't prosecute it. And we can all look at the
20 names of the people that made those decisions not to
21 prosecute at that time.

22 So that's what I'm inclined to do. I
23 understand that the defendants want to make a record,
24 and that they are entitled to that. But I do think
25 it's an uphill battle to try to convince me to

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1 dismiss these counts, and not allow them to proceed
2 to trial. So we'll be making a record, but I think
3 that the Government may -- the defendants may want to
4 take into account what I have said.

5 Now, having said that, the motion then to
6 quash the subpoenas against the two Assistant U.S.
7 Attorneys, it seems to me that the Government has got
8 to prove what I just said. They may sit there and
9 go: That's not our case at all. We disagree with
10 the judge. That's not the way we read it.

11 But if they agree with what I think the
12 history is, then you're going to have to come forward
13 with something, I think, to indicate that. I'm
14 reading what the Assistant U.S. Attorneys and the
15 Attorney General and the FBI were thinking at the
16 time. And so, absent some problem, such as a Touhy
17 request, or something like that, which I didn't see
18 in the notice here, and it seems to me that we ought
19 to -- I should not quash these subpoenas. I can't
20 make a determination at the present time as to what
21 an Assistant U.S. Attorney would have that the FBI or
22 other witnesses would not have. It may be that it's
23 clear to everybody, but it's not clear to me that
24 these Assistant U.S. Attorneys may be the only source
25 of some of this information.

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1 I realize that there may be work product
2 objections. There may be -- I'm not sure what's
3 really attorney-client, but I do think that this is
4 probably ancient history in connection with this
5 case, so it may be that there is not as much that can
6 be protected or should be protected in explaining why
7 the Government didn't bring these cases until
8 recently.

9 There also seems to me to be some waiver.
10 I have held in cases -- and you can review some of my
11 discovery opinions that on privilege, attorney-client
12 privilege, a party has to be very careful that they
13 do not try to selectively waive any work product.
14 But I've said on attorney-client privilege, it's very
15 difficult to selectively waive that privilege without
16 waiving it all.

17 But on work product, if you think about it,
18 we selectively waive work product all the time. And
19 we're always doing it. We get something, if it's
20 useful to us we use it. If it's not useful to us, or
21 we don't want to use it, we don't use it, or we may
22 hold it. That's what attorneys do.

23 But it seems to me the stuff that's in
24 302s, the stuff that I have seen in connection with
25 the disqualification of Judge Gonzales, some of the

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1 stuff that's here, it seems to me that that work
2 product has been largely waived as to that. I'm not
3 saying that it's waived as to everything, because I
4 think the Government can selectively waive -- any
5 party can selectively waive. And we'll just have to
6 take it one at a time.

7 But on the specific request that we have in
8 front of me, I guess I was not inclined to not admit
9 the testimony, and somewhat encourage the Government
10 to explain better why we're here. I think that my
11 explanation is the one that I'm inclined to agree
12 with. But I do -- I'm going to have to have evidence
13 to support it, and a record to support it, if I'm
14 going to ultimately deny these motions. So those are
15 comments I make for everybody on the motions to
16 dismiss.

17 Is this your, basically, motion, Mr. Beck,
18 that you want to argue?

19 MR. BECK: Your Honor, it's not a motion to
20 quash the subpoena. It's a notice for reasons that I
21 agree with Your Honor, that there may be situations,
22 and this may be one, where it is proper to have
23 previous AUSAs, not assigned to the case, in front of
24 the Court, testify.

25 And I agree that there can be -- I mean,

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1 I'm familiar with the attorney-client privilege and
2 the Work Product Doctrine from my practice in civil
3 law. And I will grant the Court that that area is
4 much more developed on that side of the legal arena
5 than it is in the criminal arena.

6 But I do think the intent of this notice
7 was to alert the Court to a couple issues. The first
8 is that I think that there will be overlapping
9 evidence from the FBI agents that the defendants
10 subpoenaed and intend to call. They intend to call
11 it's my understanding Special Agent Acee, Special
12 Agent Trent Pedersen, and then Special Agent Sonya
13 Chavez. Right, that's the right name? Thank you.

14 THE COURT: Well for my edification, of
15 course I know Mr. Acee, but Chavez and Pedersen, were
16 they agents that had investigated things earlier on?
17 Is that it?

18 MR. BECK: Yes.

19 THE COURT: What is their sort of
20 timeframe?

21 MR. BECK: I can't say that exactly,
22 because I don't know. Special Agent Pedersen was, I
23 believe, April of 2001, until September 11th of 2001.
24 And so he was at a meeting where they discussed some
25 of the SNM's activities in 2001, including the Garza

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1 and Castillo murders, which are Counts 1 and 2 in
2 this case.

3 THE COURT: Okay. Is what you're
4 suggesting is that let's get those people, get their
5 evidence out, and then --

6 MR. BECK: Exactly.

7 THE COURT: -- maybe the questioning of the
8 Assistant U.S. Attorneys would be more targeted?

9 MR. BECK: Right. I think that's the
10 issue.

11 THE COURT: Is it fair to say that those --
12 the attorneys made the decision on whether to
13 prosecute here or not, not the FBI?

14 MR. BECK: Well, I mean certainly, right.
15 An FBI agent --

16 THE COURT: Somebody made the call that was
17 an attorney?

18 MR. BECK: Yeah. And I don't know that
19 there even was a call made. It just --

20 THE COURT: Didn't happen?

21 MR. BECK: There was no prosecution. And,
22 obviously, it's not the FBI making those calls 90
23 percent of the time. So I think, given the case law,
24 I think the Court can rely on what it hears from the
25 special agents. And to be frank with the Court, I

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1 don't know exactly what that testimony will be.

2 THE COURT: What did you think about my
3 reading -- and I don't think we've discussed it in
4 the two years we've had the case -- what is your
5 impression of my reading of the file, particularly
6 the portions that dealt with the motion to disqualify
7 Judge Gonzales? Are you in agreement, or are you
8 saying, no, that's not the theory we want to defend?

9 MR. BECK: I think it's spot on. Yeah. I
10 think that, very honestly, the federal government,
11 the FBI --

12 THE COURT: If there hadn't have been a
13 Marcantel, we wouldn't be in court?

14 MR. BECK: I think that's probably right.
15 I think that's what this case bears out.

16 And so Your Honor's take on this is exactly
17 right. I want to see how the evidence plays out.
18 And if it comes to Thursday and Friday --

19 THE COURT: Fight it out then.

20 MR. BECK: Right. And I do want to alert
21 the Court, as I'm sure the Court is well aware, but
22 just to keep this in mind as we go through, that to
23 meet their burden for preindictment delays, it's two
24 prongs. The first is that there is actual prejudice
25 resulting from preindictment delay. And that's

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1 actual, not just speculative, and it's material
2 prejudice. The second is that the delay was
3 purposefully designed to gain a tactical advantage.

4 So the United States' position is that once
5 we hear from the special agents, once we hear from
6 the other witnesses, we will see that there was not
7 actual prejudice, and we will definitely see that
8 there is not a hint of actual purposeful design in
9 any preindictment delay, to the extent that there was
10 preindictment delay.

11 So I think, given the precedent and given
12 the clear guidance on disfavor and AUSA's testimony
13 in court, I think that the Court should look at that
14 point and decide whether it's prudent to have the
15 AUSA's testimony. Because even if they came in,
16 would it matter? And I think it will be a "no" at
17 that point.

18 THE COURT: Here's the problem -- and y'all
19 have probably known me long enough on this. I'll
20 probably decide both prongs. And so I've probably
21 got to create a record for both. And the reality is
22 I'll probably tell you what I -- you know, probably
23 at the end of the day, I'm going to do what I'm
24 saying I'm doing today. I'm not granting these
25 motions, at least for the present time. And I may

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1 have to spend my judicial energies on things that are
2 necessary to get ready for trial, and maybe come back
3 to these at the appropriate time, either -- if I get
4 caught up on my work getting ready for trial, or
5 during trial, or maybe even after trial. But I think
6 that while we're here, I probably am going to have to
7 build a record. And so that may include -- I'm just
8 giving you a heads-up, I probably am going to let
9 them put them on the stand and protect your work
10 product for this trial. I'm not going to let them
11 get into work product for this trial, but let them
12 talk to the people about who made the decisions at
13 the time, so that there is a solid record for me to
14 use when I get around to writing the opinion and
15 order.

16 MR. BECK: I think that's the Court's
17 discretion. I think I anticipated that's how the
18 Court was going to come down on this. I just wanted
19 to alert the Court to this issue, that's why I wanted
20 to set the notice for today. That's why the notice
21 asked to set the hearing for tomorrow, although we
22 have worked that out amongst each other by having the
23 argument today, and just alerting the Court to these
24 issues. And I'll probably bring it up at the
25 appropriate time. But I think we'll probably operate

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1 under the understanding that you're probably going to
2 require these gentlemen to take the stand.

3 THE COURT: Okay. And maybe it was in your
4 notice, who are the Assistant U.S. Attorneys?

5 MR. BECK: It's Assistant U.S. Attorney
6 James Braun from Albuquerque, and it's former
7 Assistant U.S. Attorney Reeve Swainston.

8 THE COURT: How is Reeve doing? He's been
9 in very poor health, isn't he?

10 MR. BECK: Yeah, he has. And I think we
11 took this up this morning, although now it feels like
12 ages ago. I think it sounds like the Court's given
13 leave for Mr. Swainston to appear telephonically to
14 the extent that he will be required to appear.

15 THE COURT: Okay. All right. Anything
16 else on your request, Mr. Beck?

17 MR. BECK: No, Your Honor.

18 THE COURT: All right. How about from the
19 defendant on this request?

20 MR. CASTLE: Well, it doesn't sound like
21 they're requesting anything at this time.

22 THE COURT: I guess, if I understand -- and
23 maybe y'all had some discussions -- they're asking:
24 Can they push these witnesses to a little later in
25 the hearing, maybe the last, so that we can protect

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1 them a little bit as attorneys, rather than having
2 them first, and maybe we can see what we get out of
3 the other people?

4 MR. CASTLE: That was our plan all along,
5 was to call them at the end, because that's kind of
6 the final assessment.

7 If I could share a couple of thoughts with
8 the Court?

9 THE COURT: Sure.

10 MR. CASTLE: And I appreciate the Court
11 giving us an outline of its thinking right now.

12 The issue is not just preindictment delay.
13 In fact, the case law on preindictment delay sets up
14 the hardest standard for -- of the standards the
15 Court is going to have to apply. The easiest
16 standard is Roviaro. In Roviaro, they said if you
17 had an informant that could provide exculpatory
18 information, the Government doesn't provide the
19 identity, the case gets dismissed. There is no
20 requirement of purposeful or bad faith at all in
21 Roviaro. And Trombetta and Youngblood are also in
22 play. But I think in some ways they end up tracking
23 some of the requirements in the preindictment delay.
24 So I bring that up to the Court --

25 THE COURT: Is your argument on this, on

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1 Roviaro, is it that even if the Government doesn't
2 know the identity of the witness, that standard still
3 applies?

4 MR. CASTLE: Well, I don't have to go there
5 because the FBI, the Government -- not necessarily
6 the U.S. Attorney's Office -- the FBI -- the evidence
7 is going to show the FBI was involved in this
8 investigation within two weeks of the murders in
9 2001. They were interviewing witnesses, they had an
10 open file. They contemplated going to the -- well,
11 they did go to the U.S. Attorney's Office and asked
12 for Grand Jury indictments on a couple of occasions.
13 They took possession of the file from the New Mexico
14 State Police.

15 THE COURT: But if we are at this point, it
16 seems like Roviaro is going to say that if the
17 Government has the name of the witness, the identity,
18 and is not disclosing it, that's when you get into a
19 dismissal situation. Are you saying it also applies
20 in this situation, where they might have known at
21 some point that that same standard is going to apply?

22 MR. CASTLE: I believe it does.

23 THE COURT: Do you have any case law that's
24 similar to our situation, where the Government is
25 saying that they don't know who these informants are,

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1 and we apply that standard?

2 MR. CASTLE: Well, I don't think they're
3 saying they don't know. They no longer remember. So
4 there is a difference. But Roviaro itself didn't
5 require it. It says, "Where the disclosure of an
6 informant's identity or the contents of his
7 communication is relevant and helpful to the defense
8 of an accused, or is essential to a fair
9 determination of a cause, the privilege must give
10 way. In these situations the trial court may require
11 disclosure. And if the Government withholds the
12 information dismiss the action."

13 THE COURT: Well, it sounds to me, though,
14 if I were to order the Government to produce it,
15 they're not going to resist that order. They'll say,
16 Yeah, but they're going to say, We don't have
17 anything to disclose. And then they're in a
18 situation where they're not withholding any
19 information.

20 MR. CASTLE: Well, what our position is,
21 Your Honor, is the focus of Roviaro is due process.
22 And the focus is on whether a defendant is going to
23 have a fair trial. The fairness of the trial in this
24 case is going to be impacted whether they negligently
25 lost it, forgot about it, or decided to delay

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1 indictment for 15 or 17 years, and therefore, no
2 longer can produce it. The problem rests with them.
3 What the problem that we have here, you know,
4 assuming we have some evidence that shows that there
5 is something lost that had value, but assuming that,
6 that loss sits at that side of the room, not the
7 defense side.

8 And so what would due process require?

9 THE COURT: So you're not trying to tag the
10 United States with the problems of the State; you're
11 trying to tag them with the problems of the FBI's
12 involvement early on?

13 MR. CASTLE: No, I think --

14 THE COURT: You're also trying to get at
15 the United States?

16 MR. CASTLE: Yes, because they were part of
17 the joint --

18 THE COURT: The State of New Mexico?

19 MR. CASTLE: Yes, they were on a joint task
20 force with the State of New Mexico investigating
21 these murders. So they worked together as joint task
22 force. They had meetings. U.S. Attorneys would
23 appear at the meetings.

24 THE COURT: Look at the record at the end
25 of the day, or four days, whenever it is, at the end

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1 of the day is nobody can establish that the FBI ever
2 knew the names of these informants; that it was only
3 the State of New Mexico that knew them. What then?

4 MR. CASTLE: Then I think you have a
5 Trombetta situation. It's recklessness. And if we
6 can show that it was actually exculpatory, then the
7 standard isn't willful or bad faith, it's --

8 THE COURT: What if you've got an FBI
9 sitting in on these task forces, and the FBI agent is
10 sitting there, and he's going, "I hate that I'm
11 sitting here because we're not going to bring this
12 case, we don't want this case," so they kind of
13 halfway out of the case because they don't want it?

14 MR. CASTLE: I don't think that's what the
15 evidence is going to show, Judge.

16 THE COURT: Okay. What do you think it's
17 going to show? Do you think the FBI was really
18 interested in looking at this case?

19 MR. CASTLE: Yes. And I think they went to
20 the U.S. Attorney's Office on numerous occasions to
21 get it indicted, and was considered for indictment.
22 I'm not sure that it wasn't subject of Grand Jury
23 proceedings in both 2008 and 2013, because it's
24 referenced.

25 THE COURT: Federal?

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1 MR. CASTLE: Yes. There is reference to
2 that in the discovery in some places.

3 So I think, as we unfold, what we're going
4 to find out is that in 2001, Agent Pedersen was the
5 agent that was assigned to this particular
6 investigation. They had an investigation that was
7 kept open all the way until 2009, where at different
8 times it got transferred to a different agent, like
9 Sonya Chavez, et cetera.

10 The other thing that I want to kind of give
11 the Court some thought about is this: In this
12 Court's attempt to create a fair trial for the
13 defendants, even if dismissal is not granted, there
14 might be other remedies the Court can fashion to make
15 sure that the case is done fairly.

16 For example, if the Court were to find an
17 informant gave a completely exculpatory statement for
18 one of the defendants, and the loss of that evidence
19 was on the Government's side with perhaps even pure
20 negligence, the Court, as a remedy, could say that
21 the defense doesn't have to present that witness.
22 You could present the statement. I'm not saying
23 that's a satisfactory result. We're asking for
24 dismissal. But at some point in time, this Court
25 might be faced with the position where it might relax

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1 certain rules of evidence to allow the admission of
2 that kind of evidence before the jury for the truth
3 of the matter asserted. I think we can get it in not
4 for the truth of the matter asserted to show that
5 they didn't pursue a lead or something of that
6 nature. But there are other remedies the Court can
7 do short of dismissal. And like I say, I'm not
8 asking for those right now, but I think that is
9 something the Court needs to think about as it
10 listens to the evidence that we're going to be
11 presenting.

12 The other thing that is of interest is the
13 law on delayed indictment seems to -- at least for
14 one factor, fall on the side of whether something is
15 tactical or investigative. If it's investigative
16 delay, then that's sanctioned. If it's tactical,
17 that's not. But then the case law doesn't really
18 tell us how to define what's investigative versus
19 tactical.

20 We believe -- I believe what the Court just
21 outlined about, Look, we don't want this case, we
22 don't want to put our resources on it, we've now
23 decided that we're going to do it in 2015 to send a
24 message to the SNM members, that's tactical to me.
25 That's not investigative.

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1 And so, now the Court --

2 THE COURT: Here's where I'm thinking the

3 line is, and you're welcome to disagree with it.

4 There is no investigative delay, because they just
5 weren't investigating anymore. It kept popping up
6 occasionally, but they kept beating it down. But
7 when they got to -- when they finally decided they're
8 going to bring something, then there were tactical
9 decisions. But I'm having a hard time seeing the
10 tactical decisions until the Marcantel -- until they
11 decided after Marcantel that they would bite on it
12 and take this case. It seems up to that point it is
13 investigative delay. They just don't want it, they
14 just don't want it. At the minute that it's
15 Marcantel, that's when the tactical decisions begin.

16 MR. CASTLE: Well, actually, all the
17 statements that are in the James table here, these in
18 regards to Counts 1 and 2, all of them are in the
19 possession of the United States Government as of
20 2008, every one of them. And only one of them wasn't
21 in their possession after 2001. So I don't think it
22 was an investigative delay at all, even during that
23 time period. It was just a decision. It was a
24 tactical decision that the United States Government
25 said: We don't want to mess with this.

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1 THE COURT: Isn't a tactical decision just
2 saying: Let's delay this thing 12 years, 13 years,
3 however many years, so that we put the defendants at
4 a disadvantage, not we're just continually telling
5 the State of New Mexico: Go away, we don't want to
6 bring these cases?

7 MR. CASTLE: No, where I think the line
8 actually is, is that investigative delay is necessary
9 delay, because it's necessary to build a case. We
10 have to keep working on it until we get enough
11 evidence to indict. Whereas, tactical is we're going
12 to wait until we want to do it, and the conditions
13 are sufficient for us to do it. And it makes sense
14 that sanctions would not be imposed in a situation
15 where the delay was necessary. Even if it caused
16 damage to a defendant, if it was necessary, then the
17 Constitution authorizes it. But if it wasn't
18 necessary, then the burden essentially shifts.

19 The Government then in some fashion has to
20 make up for the loss of evidence that they caused
21 because they made a noninvestigatory decision to put
22 this off.

23 And so I would just note that throughout
24 these times, the evidence will show the Department of
25 Corrections was cooperating with the joint task force

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1 and these particular FBI agents. So apparently it's
2 a joint decision not to. Both New Mexico and the
3 federal government decided not to indict on these
4 older charges. And I'm only addressing 2001 and '02.
5 I think the 2007 folks are going to say the same
6 thing.

7 But I just want the Court to give that some
8 thought, especially on lesser sanctions, or lesser
9 remedies. You know, those might be things that the
10 Court can deal with in its power, as the rules of
11 evidence can be relaxed at times by the Court,
12 depending on the circumstances, at least the Court
13 can consider that.

14 THE COURT: Can you give me an example?
15 I'm not sure I've had this situation before. Can you
16 give me an example where I would relax the rules in
17 your favor? What would be an example?

18 MR. CASTLE: Your Honor, there is a network
19 of rules that kind of talk about this. For example,
20 804, where there is an unavailable witness, if the
21 opposing party was responsible for the
22 unavailability, the Court then finds it's unavailable
23 and certain materials come in. 807, the residual
24 hearsay exception. The Court could say, you know,
25 these statements are corroborated enough that we

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1 should present them to the jury and the jury could
2 decide their ultimate credibility. So there is kind
3 of a network of those kinds of rules that all go to
4 the concept of fairness. Or another concept is 106.
5 Rule 106 says -- it's often called the Rule of
6 Completeness, but it's actually broader than that.
7 It says that when a party introduces a statement, the
8 Court can require any other statement that ought to
9 be in fairness considered. Okay. Once again, it's a
10 concept of allowing evidence in that otherwise
11 wouldn't come in as a basic tenet of fairness.

12 And so I think the rules of evidence, when
13 you look at them all together, they're not designed
14 to allow a party to profit because they lost
15 evidence. They're designed to promote the
16 introduction of evidence.

17 And so I filed an 807 notice for the
18 Court's consideration. But I think those network of
19 rules are ways to do it. Another concept is the
20 evidentiary concept of opening the door. If the
21 Government is going to get in evidence that says:
22 We're going to look at who conspired to commit this
23 murder, and have they opened the door to us bringing
24 in statements that -- from individuals who are no
25 longer present? I'd like to say that we could bring

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1 them in as co-conspirator exceptions, but I did do
2 some research on that, Your Honor, and it's only for
3 the Government. However, when they open the door to
4 a particular conspiracy, my argument would be that we
5 don't then look at 801. We look to the concepts of
6 401, 403, and the other rules I've cited.

7 So these are some considerations that I'd
8 like the Court to think about. It sounds like I
9 might lose, and I'm just guessing I was going to lose
10 the motion to dismiss at some point anyway, because I
11 haven't won too many over my career. But there are
12 sanctions, I think, are lesser than that, and these
13 are just some thoughts.

14 THE COURT: All right. I appreciate it.
15 Thank you, Mr. Castle.

16 MR. CASTLE: Oh, Judge, one other thing.
17 Mr. Tierney was the third U.S. Attorney that was
18 listed, and I think they may have just overlooked
19 that.

20 THE COURT: There was three subpoenas?
21 MR. BECK: Our office does not have a
22 subpoena for Mr. Tierney.

23 THE COURT: Okay. All right. We'll look
24 into that. All right. Let me let Mr. Benjamin, he
25 stood up. Mr. Benjamin.

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1 MR. BENJAMIN: And, Your Honor, this is one
2 of the reasons why we had joined that was, and the
3 Court had asked for a specific instance of how this
4 might have come into play, and want to dovetail into
5 Mr. Castle's argument. One of the problems with the
6 way that this case has been -- and our position, as
7 Mr. Castle articulated, investigated is that, in
8 2001, Mr. Gallegos was working in the kitchen. There
9 would have been logs normally for those type of
10 things, documents leaving the pod, going into the
11 kitchen, so forth, so forth.

12 What has been preserved has been positive
13 statements for the Government. What has not been
14 preserved is documents is that we would rely on in
15 this case, for instance, to go -- logs going to and
16 from the kitchen, and those kind of things. And
17 those would be useful against Leroy Torrez and
18 Leonard Lujan.

19 And so the preservation has been done on
20 the investigative side with the statements, but it
21 has not been done on the other side with the
22 exculpatory documents, or possibly exculpatory
23 documents.

24 And so that's in response to the Court's
25 request for a specific item.

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1 THE COURT: All right. I appreciate that.

2 Thank you, Mr. Benjamin.

3 Anybody else want to speak on this?

4 All right. Mr. Beck.

5 MR. BECK: I don't want to take a lot of
6 time here, because I think this is going to be
7 rehashed later on. I will just point out a couple of
8 things. I think the Court's reading of Roviaro is
9 correct. I would be surprised to find out that there
10 are sort of an interplay between the rules for some
11 other sort of relief. And I would caution how
12 much -- how useful --

13 THE COURT: Well, isn't there a Supreme
14 Court case, though, that talks about -- I don't know
15 the name off the top of my head, but I thought I had
16 seen the Supreme Court talking about there may be
17 some situations where you can have, and should have
18 relaxed evidentiary rules? I don't know if it's this
19 situation or not, but I have seen that.

20 MR. BECK: Right. I mean, I think that
21 does sound familiar in the hundreds of cases I've
22 read preparing for this. But, again, I would caution
23 how much weight to give that to this case. And this
24 is why I said at the beginning, I don't think we're
25 going to get to the AUSAs' testimony, because I don't

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1 think there will be any evidence of actual prejudice.

2 And, for instance, one of the sources
3 attached to the motion is this -- attached to
4 Mr. Garcia's motion is this FBI -- well, it would be
5 a 302. This is actually the sentinel working copy.
6 But it's DeLeon Bates 605. And so if you're talking
7 about 804, the Government, you know, procuring the
8 unavailability of the witness, or something like
9 that, and that we should allow this piece of evidence
10 in under 804, or even 106, the problem with doing
11 that under 106 is that where we say here -- where
12 this source, whomever it may be -- says in that
13 second paragraph, "Manzanares is in debt to the SNM
14 because of the killing. Manzanares required the hit
15 through Cheech. Cheech and Angel Munoz are close
16 friends."

17 In the very next sentence it says, "Source
18 stated that Billy Garcia gave the order to hit
19 Castillo. Manzanares and Garcia will be killed for
20 their involvement in the killing of Castillo."

21 So it's not exculpatory as to Mr. Garcia.
22 It says right there -- so if the intention of
23 bringing this into evidence for the truth of the
24 matter asserted in there is that it pointed to
25 Manzanares. Well, the way the Government rebuts that

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1 is that there is not only one person who says ordered
2 the hit here, it also says Billy Garcia ordered the
3 hit. And so --

4 MR. CASTLE: Your Honor, I could make a
5 quick -- we weren't going to offer that.

6 MR. BECK: I figured you probably weren't
7 going to offer that. But what I'm pointing out here
8 is that these statements are not clearly exculpatory,
9 as the defense would like to believe. So there is
10 that danger. And the cases talk about the prejudice
11 to both sides, balancing the prejudice. And this
12 statement, losing this source is certainly more
13 prejudicial to the United States, equally
14 prejudicial. I would argue more.

15 Mr. Castle referred to the James statements
16 as being in the Government's possession since 2001
17 and 2008. That may be true, but the evidence was not
18 in the Government's possession at that time. And
19 that's what the Court will see is that these
20 statements were out there, but the United States
21 couldn't just offer the police reports into
22 custody -- into evidence at a trial, because that
23 would be rank hearsay.

24 What the United States didn't have until
25 2015, and later in some cases, is the evidence, the

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1 means through which we could put somebody up on the
2 stand who would testify to these James statements.
3 That's what the Government now has. So where Mr.
4 Castle was talking about we don't have preindictment
5 delay to dismiss a case where the delay was necessary
6 to the case. Well, that's this case. The delay was
7 necessary because we didn't have the evidence until
8 we had all these new sources who were coming through
9 to testify as witnesses.

10 So that motion to dismiss precedent that
11 says it must be necessary to the investigation weighs
12 in favor of allowing us to present this case, and not
13 dismissing it. Because the United States -- and to
14 that extent the State of New Mexico -- only got this
15 evidence that has certainly been on written paper in
16 2001, but the United States only got this evidence --
17 this evidence only existed in 2015 or later, once we
18 had the sources who would come testify.

19 And I'll leave it at that, because, as I said,
20 I think we're going to be hearing a lot of this the
21 next couple of days.

22 THE COURT: All right. Thank you, Mr.
23 Beck.

24 Mr. Burke, do you have anything to add?

25 MR. BURKE: Yes. What Mr. Beck just said

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1 is just not true. All of the evidence for the 2001
2 homicides existed prior to this investigation, Mr.
3 Acee's, the March 2015 investigation, except for a
4 statement or two from the new snitches. So the key
5 statements on the 2001 homicide long existed. You
6 just heard about Ruben Hernandez. That's always been
7 there. Lujan from 2007. So I just want to say
8 that's not true. I think you hit the nail on the
9 head. It just didn't get indicted until later. And
10 it was all practical considerations. It was not
11 because of, you know, what Mr. Beck is saying now.
12 And I don't know if we can ever get to the burdens
13 that we have --

14 THE COURT: What he's saying is he didn't
15 have all the evidence.

16 MR. BURKE: Yeah, they had the evidence.
17 It's just that they didn't do it. And I think you
18 hit nail on the head.

19 THE COURT: They didn't want to do it.

20 MR. BURKE: Yeah, they didn't want to do
21 it, the money, working together.

22 THE COURT: Well, the Government has
23 probably got to be consistent. If they didn't have
24 the evidence, that's one thing. But if they didn't
25 want to bring the investigation, which has been my

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1 sort of take on it, they didn't want to bring the
2 prosecution; seems to me those are two different
3 stories.

4 MR. BURKE: That's all -- I don't know if
5 we can ever get there to have a motion that should be
6 granted. But that's really the situation. The 2001
7 homicides were just there. And then this prosecution
8 said: Let's just throw them into this thing after
9 the Marcantel allegations.

10 THE COURT: Well, I don't want to get too
11 far down the pike on motions to dismiss. But I guess
12 one of the things that is of interest to me was the
13 fact the State of New Mexico didn't prosecute these
14 things either.

15 MR. BURKE: No. I mean, you obviously did
16 look at the attachments.

17 THE COURT: So you're looking at a
18 situation where just nobody is bringing these things.

19 MR. BURKE: Correct.

20 THE COURT: Which way does that cut? It
21 would seem to me that cuts against the defendants,
22 because it's like nobody wants this case.

23 MR. BURKE: And the reason we did that was
24 to bring up Mr. Castle's point about it was a
25 tactical decision.

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1 THE COURT: Okay.

2 MR. BURKE: That's why we brought that up.

3 THE COURT: Tactical rather than

4 investigative?

5 MR. BURKE: Exactly. Thank you, Your
6 Honor.

7 THE COURT: Thank you, Mr. Burke.

8 All right. Anything else, Mr. Beck?

9 MR. BECK: Not at this time.

10 THE COURT: All right. So we will -- I'm
11 not precluding the defendants from calling the AUSAs,
12 and I most likely will allow it. But I'll probably
13 liberally protect the Government's work product in
14 this case. And we will not hear from those attorneys
15 until the end of the evidence on the motions to
16 dismiss. They'll be the final witnesses on that.

17 All right. Let's then go to what Ms. Wild
18 has tabbed 1, which is a motion to sever by Andrew
19 Gallegos, which has been joined in by Joe Gallegos,
20 Edward Troup, Shauna Gutierrez.

21 As we were talking a little bit earlier
22 today, I'm not inclined to sever. I've stared at
23 this chart for now a couple of years as to how to try
24 these things. I'm not excited about trying eight
25 defendants. I feel like I worked pretty hard to try

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1 four, and trying eight doesn't excite me. But I'm
2 having a hard time, even after we went through all
3 the conspiracies this morning, to figure out a better
4 way to proceed. There is a lot of overlapping
5 defendants among these five indicted conspiracies,
6 and it's hard for me to come up with another way to
7 go. So I guess I'm inclined to deny it.

8 I guess if the Government got up after
9 they've been through a trial, two-month trial with
10 four defendants, if they said they feel like it ought
11 to be severed, I'd probably take a hard look at that.
12 But we have lined these things up on a runway. And
13 it's kind of difficult to figure out how to try
14 folks, given the way we've lined them up. So I'm not
15 inclined to grant this motion. But, Ms. Torraco, if
16 you wish to argue in support of it.

17 MS. TORRACO: Thank you, Your Honor. I
18 appreciate the fact that you're going to take a
19 second look at it and allow me to argue it.

20 THE COURT: And I did read everything, so I
21 have read all your briefing on this issue.

22 MS. TORRACO: Well, since Mr. Roberts
23 drafted and filed this back in October, and since
24 that time, now we have more discovery and more
25 information, which makes it, to us, more compelling

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1 that the severance should be granted.

2 THE COURT: We also got fewer defendants.

3 MS. TORRACO: That's true.

4 THE COURT: So it's a little better
5 situation than when it was filed.

6 MS. TORRACO: If I may, Your Honor, the
7 case that -- there is a couple of cases that were
8 cited by Mr. Roberts in the brief. The one that I
9 particularly like, because it's very close to on
10 point to the issues here, is the Gallo case, United
11 States v. Gallo. That's the case of the Gambino
12 Crime Family in New York, and they were indicted on
13 racketeering charges. And so a lot of those issues
14 of severance are outlined in that particular case.
15 And in that particular case, they talk about -- and
16 I've been referring to this kind of as a nice diagram
17 as I've been going through the case -- they talk
18 about this wheel, where they in the Gambino case have
19 identified kind of the head guy, and the head guy
20 being the center of and the focus of the entire case.
21 And then there are all these different conspiracies,
22 if I may, that are the spokes of this wheel. So
23 there is, you know, these different conspiracies.
24 And of course, the racketeering is what ties it all
25 together, and that's the hub.

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1 The problem is that in this particular case
2 against our client Andrew Gallegos, in a lot of ways
3 Joe Gallegos is at the hub of Trial 2. And Joe
4 Gallegos is involved in several different
5 conspiracies.

6 So couple that with the statements that we
7 received in the Document 1903. So Joe Gallegos makes
8 a lot of statements, or is purported to have made
9 several statements that refer to or there are
10 statements made about Joe Gallegos that refer to the
11 SNM conspiracy and the racketeering charge. The
12 problem is because there is one spoke, one very small
13 conspiracy between -- that's alleged between our
14 client, Andrew Gallegos, and Joe Gallegos, all of
15 those statements are going to be used against Andrew
16 Gallegos, even though they have nothing to do with
17 Counts 4 and 5, which are the Andrew Gallegos counts.

18 So, for example, there are statements, such
19 as number 13, has nothing to do with the Adrian Burns
20 murder. And that's Counts 4 and 5. But in that
21 statement it's alleged that Joe Gallegos ordered a
22 hit. So that statement comes in against Joe
23 Gallegos -- may or may not come in -- but that
24 statement comes in against Joe Gallegos. Well, guess
25 what? They have established through a hearsay

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1 statement by a co-conspirator that has nothing to do
2 with my client, that now my client is working with
3 someone who has ordered a hit on another case. In a
4 trial, a sole trial against Andrew Gallegos, that
5 information would never be admitted.

6 And we can go through several more of the
7 statements where, for example, on the Jose Gomez
8 issue, and those assaults and that conspiracy, again,
9 Joe Gallegos put a hit out on him. That testimony
10 should not be admissible against Andrew Gallegos.
11 And I'm asking the Court to take a good look at the
12 fact that I don't think that Andrew Gallegos is going
13 to get a fair trial so long as he is tried with these
14 other cases.

15 Because it's not just the center and the
16 spokes. What's happening is it's becoming a huge
17 weave, kind of a web, where statements that have
18 nothing do with the counts that are alleged on the
19 Adrian Burns murder, nothing to do with Andrew
20 Gallegos are going to be attributed to him because
21 he's associated as a co-conspirator with Joe
22 Gallegos. Did that make sense?

23 THE COURT: Oh, yeah, yeah.

24 MS. TORRACO: And so that's the concern of
25 the defense. The problem is, now in the Gambino

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1 racketeering case, the court ultimately had to sever
2 what they kind of considered the smaller players,
3 because what happens is: When you throw out this
4 wide net, you pick up many of the small players. The
5 Gallo case, which is the Gambino murders, outlined
6 several factors which I want to add to the brief that
7 was already done. And one of them is the
8 disproportionality of the evidence. When there is only
9 a small portion of the evidence that goes to one of
10 the accused, it is not appropriate for them to be
11 tried in the larger picture. And it's not just the
12 spillover effect or the inevitable prejudice, but we
13 can take, again, a look at some of these very
14 specific statements. Not only is there a statement
15 that's going to come in -- let's just assume that
16 they're trying to get in -- that Joe Gallegos put a
17 hit on Gomez. There is also statements that Joe
18 Gallegos is the jefe, that he ordered another hit,
19 that people are protecting him, that this message is
20 from Joe. And the problem is the more and more that
21 that we get into statements, not necessarily by
22 Andrew Gallegos' alleged co-conspirator, but by the
23 other co-defendants in the case, not even relating to
24 the case, not even relating to the counts of Adrian
25 Burns. They are still going to reflect negatively

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1 on, and tie Andrew Gallegos closely to Joe Gallegos
2 and inferring guilt on the Adrian Burns trial.

3 And I don't know how this Court can always
4 enter limiting instructions without at some point
5 it's clear that Joe Gallegos is the boss. And Andrew
6 Gallegos does hang out with his brother. And at some
7 point, Your Honor, there is no fair trial left for
8 Mr. Andrew Gallegos.

9 THE COURT: Well, let me give you my
10 impressions, just having finished the other, is that
11 pretrial we focused tremendously on these statements.
12 And we just stare at them and they just obsess us.
13 But the thing that I kept being worried about and the
14 reason I didn't sever more last year than this is
15 because I was fearful that the great bulk of the
16 evidence that was coming in was going to be going to
17 establishing enterprise, racketeering activity, and
18 those things, which go against all the defendants.
19 Having now sat through seven weeks of that testimony,
20 it seems to me to have played though the way. But
21 the statements, they're important, I'm not
22 minimizing. But they were not a great bulk of the
23 trial. The great bulk of the trial was all this
24 enterprise activity, all this racketeering activity
25 and those sort of things, so that there is an

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1 overwhelming amount of information that's going to
2 come in as to Mr. Andrew Gallegos and all the
3 defendants to establish racketeering activity and
4 enterprise.

5 MS. TORRACO: So this case is different
6 than the first trial, Your Honor. And if I may, I
7 know the Court is familiar with the facts, but if I
8 can just back up a little bit. This is a case where
9 our client is charged with a murder. And what
10 happens is the fire department sees way out in the
11 bosque that there is smoke coming up, and there is
12 flames, and the fire department rushes out and sees
13 that, in addition to a car burning, there is also a
14 body burning.

15 Okay. The evidence against our client, Mr.
16 Andrew Gallegos, there are allegations that there was
17 blood all over him, which the evidence shows that
18 there was not blood all over him. There is
19 allegations that there was accelerant. Our clients,
20 Mr. Andrew Gallegos and Joe Gallegos, were seen at a
21 gas station buying gas sometime earlier. There is
22 absolutely no accelerant found on our client. There
23 is no accelerant found on the decedent. There was no
24 blood found on our client. There was no blood found
25 at the house. The blood that was found was not

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1 consistent with Adrian Burns. There is no motive in
2 this case for our client to have killed Adrian Burns.
3 The fact of the matter is there is plenty of evidence
4 that Adrian Burns, in fact, was a drug dealer; that
5 they had gotten drugs from Adrian Burns. And there
6 is no reason why anyone would want to kill their drug
7 dealer.

8 There is no footprints. There is no tire
9 prints at the scene. Some of the blood that was
10 found is not consistent with human blood and it's
11 more consistent with the Matanza that the family had
12 just a few days prior.

13 So the evidence against Andrew Gallegos is
14 not strong. However, there is a very large Bruton
15 issue that also supports severance, because according
16 to this chart in 1903, there are several statements
17 that are going to be attributed to Joe Gallegos
18 regarding Andrew Gallegos. For example, statement
19 number 44. It says that Joe Gallegos says that he
20 and Andrew asked Jason to clean up their carpet.

21 The statement that Mr. Benjamin just asked
22 in the earlier hearing, statement number 43, the
23 declarant is alleged to have been the Gallegos
24 brothers. There is reason to believe that that
25 statement was actually made by Joe, that he knew the

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1 police were looking for them. There are more Joe
2 Gallegos statements that -- we can't cross-examine
3 Joe Gallegos as to his statements, but they're going
4 to come in against Andrew Gallegos. And if I can
5 have just a minute, I'll pull some of those
6 statements.

7 THE COURT: You may.

8 MS. TORRACO: So right now we have 43 and
9 44 regarding Joe Gallegos. There is statement number
10 41, which it's not clear who it's attributable to.
11 We believe that it's going to be attributed to Joe
12 Gallegos, statement number 41, that he and Andrew
13 just pulled a job. They had to go clean up. I mean,
14 there is a clear Bruton issue with that particular
15 statement.

16 Statement number 42, we also believe that
17 will be attributed to Joe Gallegos. And again,
18 that's Joe Gallegos saying he and his brother. It
19 says they were covered in blood. The evidence in the
20 case is actually contrary. There was a little bit of
21 blood found, but like I said, it was consistent with
22 animal blood, not human blood. Advised that they
23 were cleaning the house. Gallegos later went by.
24 Looks like the statement is that they were cleaning
25 the house. That goes -- and that would be a Joe

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1 Gallegos statement against he and Andrew.

2 And then we have 43 and 44. And statement
3 number 46 which is attributable to Joe Gallegos. Joe
4 Gallegos found out the police were coming to search
5 the house, and he gave several guns and other stolen
6 goods to Jason to store elsewhere. And the reason
7 that's also against Andrew Gallegos is because they
8 were living together. Joe Gallegos and Andrew
9 Gallegos at the time, it's represented that they were
10 roommates. So we have a Bruton problem.

11 We also have admissions by Joe Gallegos in
12 other conspiracies, or not admissions, I'm sorry,
13 statements made about Joe Gallegos in other
14 conspiracies, which there is no evidence that Andrew
15 Gallegos is a member of the SNM. But the more that
16 the Government hammers that Joe Gallegos was a member
17 of SNM; that Joe Gallegos is involved in all of these
18 alleged acts; that Joe Gallegos is guilty; that Joe
19 Gallegos admitted this. What's happening is Andrew
20 Gallegos is going to get pulled into it just guilt by
21 association.

22 The threshold is really: Can Andrew get a
23 fair trial? And I don't know if he can, Your Honor,
24 with all of these statements.

25 Statement number 54, Brandy Rodriguez makes

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1 a statement and it says, You better not testify
2 against my jefe." Is the jefe Joe Gallegos? And so
3 does that also infer that that's Andrew Gallegos'
4 jefe?

5 Does the Court -- I know you understand. I
6 don't mean it like that, but are you following my
7 Bruton concerns?

8 THE COURT: I am.

9 MS. TORRACO: Should I keep talking? I'm
10 just not used to you being quiet, I'm sorry.

11 THE COURT: Well, I guess maybe I should
12 have done this earlier, but I need to probably find
13 out how the Government is going to propose to deal
14 with some of these Bruton issues. Some we dealt
15 with -- my words, not probably the defendants'
16 words -- but the Government was fairly generous in
17 Brutonizing a lot of statements that for which I had
18 found there was no Bruton violation, to try to reduce
19 the number of limiting instructions. So that even
20 though a number of limiting instructions were given,
21 they were given for evidence that didn't have
22 anything to do with the other defendants. I mean, I
23 was giving limiting instructions that the evidence
24 didn't have anything to do with the other defendants.
25 It only had to do with the one defendant who was a

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1 declarant. If we're going to have that sort of trial
2 where we not only do Bruton, which I'm required to
3 do, but we also go further and Brutonize statements
4 that are not admissible against other people -- so
5 there is not a constitutional problem, but there is
6 an admissibility problem -- and clean that up. It
7 seems to me that you're going to have less to worry
8 about.

9 MS. TORRACO: So can we hold this severance
10 in abeyance, address the issue of the admissibility
11 of some of these statements. Because if some of
12 these statements are still coming in, then I think
13 our motion for severance is still ripe. Because if
14 there are statements made by -- allegedly made by Joe
15 Gallegos incriminating his brother, Andrew Gallegos,
16 we have an admissibility problem. If those
17 statements are going to come in, I don't see how a
18 limiting instruction can help that.

19 THE COURT: Well, I can't limit
20 instruction a Bruton problem.

21 MS. TORRACO: Right.

22 THE COURT: So I'm not attempting to do
23 that. But if the Government sanitizes the statements
24 the way they did in the first trial, then there may
25 be a limiting instruction. But it's hard to imagine

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1 how anybody would use the evidence against other
2 defendants anyway.

3 MS. TORRACO: Right. I would suppose we
4 need to wait and see how they're going to sanitize
5 these statements. The problem is, is that there is
6 really only two people really in this conspiracy, and
7 that is Andrew and Joe, on the Adrian Burns murder.
8 So I don't know how --

9 THE COURT: I don't think that they're
10 going to probably want to sanitize those. And I'm
11 not sure how you sanitize those, if those are going
12 to come in as co-conspirator statements, which is the
13 James hearing, they're just coming in. But I don't
14 think a severance helps you there.

15 MS. TORRACO: Are you talking about not the
16 Bruton statements, not the statements that Joe says,
17 my brother and I, we just did a job, we'll take
18 that --

19 THE COURT: That's going to probably come
20 in. I imagine what the Government is going to say is
21 that's going to come in under the co-conspirator
22 statement.

23 MS. TORRACO: But there is still a
24 confrontation problem.

25 THE COURT: Well, correct me if I'm wrong,

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1 I think the Supreme Court has said: If you satisfy
2 the co-conspirator exception, you satisfy the
3 Constitution.

4 MS. TORRACO: And the right to confront and
5 cross-examine?

6 THE COURT: Correct.

7 MS. TORRACO: So the bigger threshold is,
8 is there a due process violation? Does the client
9 get a fair trial?

10 THE COURT: Well, I think the Supreme
11 Court, though, has said that if you satisfy -- that's
12 one reason that we're going to work real hard on this
13 James hearing, because it's very important. But if
14 it comes in under co-conspirator, it satisfies, if I
15 remember the language of the Supreme Court, the
16 constitutional problems. It doesn't say just
17 confrontation or Sixth Amendment or due process. I
18 think it says constitutional problem.

19 MS. TORRACO: So there was another case
20 that was cited in our brief, U.S. versus Lujan, which
21 came out of New Mexico. And in that particular case
22 there was one defendant who was charged with two
23 murders, and two defendants who were charged with
24 only one of those. And the Court found that they
25 cannot be tried together because the prejudicial

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1 effect of hearing of the other murders of their
2 co-conspirator was far too prejudicial for the people
3 who were only accused of being involved in one
4 murder.

5 THE COURT: But that was not a VICAR case.

6 MS. TORRACO: No, it wasn't.

7 THE COURT: So that's the problem that you
8 have here, is that certain evidence as a rather
9 generous amount of information can come in as
10 relevant to the enterprise and to the racketeering
11 activity to establish it as to all the defendants.

12 And that's the problem that I see with
13 severance; continuing to slice and dice this further
14 is that we just sat through a huge amount of evidence
15 on the racketeering and enterprise side, and that
16 will have to be repeated in any trial that we do. I
17 mean, the Government can try their cases differently,
18 depending upon the defendants in the case. And I
19 expect that this case will look a little different.
20 But at least pretrial I'm not sure I can really tell
21 the Government how to prove racketeering, or how to
22 prove the enterprise, that they get to kind of be
23 cleared of that.

24 MS. TORRACO: So I understand the Court's
25 concern. And in the Gambino racketeering case --

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1 well, actually, let me back up. Most of the murders
2 in Trial 2 took place in 2001. That's all these
3 motions to dismiss. My client is charged and accused
4 of participating in a murder that took place in 2012.
5 So he's being tied in to past bad acts of all of the
6 other co-defendants going back all the way to 2001.
7 There is no evidence that he was an SNM Gang member
8 back in 2001. But 11 years later, there is another
9 murder, and they're associating that as an SNM
10 murder. I'm still at a loss for how they're going to
11 do that, but they're still tying that together.

12 THE COURT: But isn't the Government going
13 to stand up and say: Your Honor, one of the things
14 that we have to establish as far as enterprise is
15 continuity and continuing racketeering activities.
16 And it's a little difficult to tell them that they
17 are tasked with proving those beyond a reasonable
18 doubt: Continuity, structure, racketeering activity,
19 and then say, Well, we get to pick the timeframe in
20 which they produce or select the evidence.

21 MS. TORRACO: But Andrew Gallegos shouldn't
22 be punished for that. They have a burden. Andrew
23 Gallegos wasn't involved at all in 2001. That's not
24 his fault that they have to prove something that may
25 not be provable as to Andrew Gallegos.

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1 THE COURT: I don't think that they have to
2 say the racketeering activity -- that the enterprise
3 didn't exist until Andrew Gallegos joined the SNM
4 Gang. I think they can establish that the enterprise
5 existed before he did, and continues to exist up to
6 the time of the indictment. And so his joining the
7 SNM, I don't think, really limits the Government's
8 proof as to racketeering activity or enterprise.

9 MS. TORRACO: I hear what you're saying,
10 but the prejudice there is actually --

11 THE COURT: If we were to try Andrew
12 Gallegos alone --

13 MS. TORRACO: That's my hope. I would like
14 that.

15 THE COURT: -- they could still bring in
16 all that evidence.

17 MS. TORRACO: They wouldn't be able to
18 bring in all those statements. And here's --

19 THE COURT: That's a different issue.

20 MS. TORRACO: Right.

21 THE COURT: But as far as going back in
22 time and proving racketeering activity and
23 enterprise, they could bring it all in.

24 MS. TORRACO: Well, they can't bring it all
25 in.

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1 But this is my concern with him being tried
2 with Joe Gallegos, and all the other defendants for
3 that matter. If Joe was doing things in 2001, with
4 whatever co-defendant, and then Joe was doing
5 something in 2001 with another co-defendant, and if
6 Joe was doing something in 2001 with another
7 co-defendant, now, everyone is going -- now the jury
8 is going to be misled to think that because Joe was
9 accused of all these other things, therefore, he must
10 have done this in 2012.

11 And if Andrew was with him -- see Andrew
12 was with him this time. What's happening is, with
13 Joe Gallegos, it appears to me that there is a theory
14 that Joe Gallegos always has an accomplice. There is
15 one alleged murder that Joe was involved in and he
16 has a buddy. There is another alleged murder that
17 Joe Gallegos was involved in and he has another
18 buddy. And there is another murder that Joe Gallegos
19 was accused in, and he has another buddy.

20 So the Government brings that out, and so
21 now, when they're accusing him of a murder of Adrian
22 Burns, and they're going to lump Andrew Gallegos, and
23 say, well, Andrew must have been with him, because
24 Andrew was seen with him at the gas station. Andrew
25 lives with him and was there that night. Andrew was

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1 found with him later on in a hotel. He was with
2 Andrew.

3 So, therefore, because Joe went out with
4 Troup and because Joe went out with the other
5 defendant, and on and on and on, therefore when Joe
6 was found with Andrew, Andrew must be guilty, because
7 Andrew was with Joe Gallegos, and Joe Gallegos has a
8 pattern of always taking a buddy. And that's
9 supported by Document 1903, where there are many
10 statements made by Joe Gallegos to say that he was
11 the leader, and the other guy was the buddy.

12 Now he's found with Andrew Gallegos. Joe
13 is a suspect in this murder. Andrew must have been
14 involved. I guess I'm stuck on the bigger principle
15 of: Is my client really getting the due process that
16 he deserves, or is he going to be thrown together
17 with a guilt by association?

18 I know the Court has already heard all of
19 this. I appreciate you listening to me, because I
20 know that -- you already told me that you pretty much
21 had your mind made up. If the Court will hold this
22 in abeyance and not issue an order. Let's go through
23 the James hearing -- there are several Bruton
24 statements -- and then reevaluate it again at the end
25 when the Court makes a ruling on the statements, that

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1 would be appreciated by Andrew Gallegos' counsel.

2 THE COURT: All right.

3 MS. TORRACO: Thank you.

4 THE COURT: Any other defendants -- I know
5 several defendants joined Andrew Gallegos' motion.

6 Does the hub of, the center of the spoke want to
7 speak on this motion?

8 MR. BENJAMIN: The hub does not.

9 THE COURT: The hub is going to remain
10 silent.

11 How about the Government? Ms. Armijo? I
12 guess the first question was, the one I was
13 discussing with Ms. Torraco is, are we going to try
14 this case the same way we did the first one, with the
15 same sort of limiting instructions, Brutonizing
16 statements that don't necessarily fall under Bruton,
17 but we're going to use the same sort of rules for
18 that -- for this trial that we used in the first
19 case?

20 MS. ARMIJO: I think that those are several
21 questions. Are we going to try this case the same
22 way? Yes, we'll have cooperators who will get on the
23 stand and who will say -- who will establish the
24 enterprise, the racketeering activities, and talk
25 about the SNM. So to that extent, yes.

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1 As far as Brutonizing, all the statements
2 that she listed, defense counsel listed, do not fall
3 under Bruton, because they were made to individuals,
4 and the Court has it correctly that they are
5 co-conspirator statements.

6 THE COURT: What about statements that I
7 determine under the rules of evidence only can be
8 admitted against that person? One of the things that
9 gave me comfort in the first trial was the
10 Government's offer that in those situations, while
11 they're not required to be Bruton, that they would go
12 ahead and Brutonize those statements.

13 MS. ARMIJO: Well, that was a different
14 situation because, as you recall, we had a lot of
15 recordings. And some of the recordings were very
16 damning against co-defendants, you know. And so I
17 think we took that approach, given the nature of the
18 recordings. In this case, a lot of the statements
19 that she was talking about were statements made
20 during the course of the murder, not during
21 recordings that were two years later, that were done.
22 And they were made -- they were nontestimonial; they
23 were made to people who were involved as far as
24 witnesses, or that they were spoken to afterwards
25 near the time of the murder.

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1 So I guess to the extent that we're going
2 to be dealing with the individual statements, we do
3 need to deal with that later. But I don't think, as
4 to the statements that were mentioned, we at this
5 point plan to sanitize them.

6 THE COURT: And I wouldn't expect you to
7 sanitize, for example, co-conspirator statements.
8 I'm not talking about that.

9 MS. ARMIJO: Right.

10 THE COURT: I am talking about, if we have
11 statements -- for example, statements that are party
12 admission that would implicate more than one person,
13 more than one defendant, that those statements, that
14 we Brutonized those in the first case, and we would
15 Brutonized them here. And we would say to the jury
16 that they could only use parties' statements against
17 the party that made them.

18 MS. ARMIJO: I think we would have to see
19 what it is. Like, again, the statements that she was
20 referring to, I believe we all feel they're
21 co-conspirator statements. If there are other ones
22 that are identified, that we would -- certainly we
23 would relook at that.

24 THE COURT: You don't or do think?

25 MS. ARMIJO: I do think the ones that she

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1 identified are co-conspirator. If there are others
2 out there, and Mr. Castellano is handling the
3 statements, or anything else that we come across,
4 certainly, we would look if it falls under Bruton,
5 and we would look it over.

6 THE COURT: I'm talking about a situation
7 where it doesn't fall under Bruton. I've got to do
8 my job under Bruton.

9 MS. ARMIJO: I guess I'm just trying to
10 think of what statements it is. We certainly would
11 be open to it.

12 THE COURT: Well, but here's the problem.
13 I've got to make a decision on the severance now. So
14 here is the reality: And this is what -- let's go
15 back a little bit in history. When I denied Mr.
16 Sanchez' motion, sitting back there where Mr. Burke
17 is, when we were doing these hearings earlier, his
18 renewed motion to sever, I was able to put
19 confidently into the opinion for the second time that
20 I had not been presented any evidence that was going
21 to be used by one defendant against -- one
22 defendant's statements that were going to be used
23 against another defendant.

24 Then, right before the Christmas holidays,
25 those last two days, we began to identify some

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1 statements, as we did the James hearings. We began
2 to identify statements that were going to be coming
3 in as parties' admission, but they can only be
4 admitted against that defendant. And there was no
5 other hearsay exception that I could see. That was
6 when I began to be concerned that, while I could
7 constitutionally give legal limiting instructions, I
8 was uncomfortable with the ability of the jury to
9 absorb the ones that I was going to have to make
10 there. And so that was the reason I began to think
11 about two juries and more severance, or something
12 like that.

13 It seems to me now is the time for us to
14 think about: Is this trial going to look exactly
15 like -- on these issues -- as it did in the first
16 trial, where I was comfortable with not granting
17 further severance and not doing multiple juries, or
18 is the Government presenting a different scenario?
19 Because then it's different than what I was looking
20 at in December when I could confidently say: So far
21 nobody has identified any evidence that's going to be
22 used.

23 So I'm not sure just taking a look at it
24 down the road is going to do it for me. I'm going to
25 have to have some commitment from the Government.

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1 And if I don't get it, then I think we need to take a
2 harder look at these severance motions.

3 MS. ARMIJO: Well, I think there is a
4 couple of things. And one is I believe that the
5 whole issue with the statements and everything else,
6 I mean we -- I haven't seen a statement that was
7 identified, at least as to this severance, that would
8 come in; that would be different than the
9 co-conspirator. And so it's kind of hard --

10 THE COURT: It seems to me that the
11 Government is giving up even less evidence in this
12 trial than it was willing to give up in the first
13 trial.

14 MS. ARMIJO: Not necessarily. I just can't
15 think of it. Because this trial is a little bit
16 different, because we had recordings in there that
17 were quite damning. So we were able to do it. In
18 this case, we do not have the recordings, so I think
19 it's different. And I think Mr. Beck has filed his
20 motion in limine to get the Court to look at the
21 statements a little bit differently, which it still
22 has to do. So that's one thing that we would ask the
23 Court to do.

24 And I think that -- I mean, I'm sure that
25 we would probably, if confronted with that, we

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1 certainly would look at it. But the Court did an
2 excellent job as far as limiting instructions, too.

3 And as you heard the Government talk about
4 how they certainly got the point of the limiting
5 instructions as they applied. I think the Court can
6 certainly give limiting instructions as well. And I
7 expect the Court to do so.

8 THE COURT: But I think that the limiting
9 instructions were very clean to the jury, in the
10 sense that they quickly picked up that if one of the
11 defendants said something, they were going to be
12 either told or they knew: Don't use it against
13 anybody else. And I'm not getting that assurance
14 from the Government that it's going to play ball as
15 it did in the first trial, and so then I think I have
16 to sit down and look harder at the severance motions
17 because I now can't say what I said in December, and
18 in the earlier motion where I actually severed these
19 cases, that no evidence is going to be used against
20 one defendant that can't be used against another.

21 MS. ARMIJO: And I guess, then, I just
22 think it's apples and oranges. I think that the
23 recordings were different than statements we have
24 now. And the reason why I just don't want to say
25 fully, say, Yes, we will do all that, is because it's

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1 different. The statements that were identified do
2 not fall under -- do not fall under Bruton, fall
3 under the co-conspirator, and I don't believe --
4 quite honestly, we don't have the recordings -- I
5 don't think that there is anything out there for the
6 Court to have to deal with that issue or for the
7 United States to deal with that issue.

8 THE COURT: It seems like it's very little
9 for you to give up, then.

10 MS. ARMIJO: May I just have a moment, Your
11 Honor? Mr. Beck is dealing with the statements.

12 MR. BECK: Your Honor, I think, ultimately,
13 it comes down to how you're going to rule on the
14 motion in limine.

15 THE COURT: See, I guess I don't. I mean,
16 if you've got an ability to get the evidence in
17 another way, it's just like state of mind. I mean, I
18 allowed state of mind in the first trial. But we
19 still did not allow statements that were coming in
20 under 801(a), we weren't allowing those to come in,
21 if that was it.

22 MR. BECK: Right. And so I think that's
23 true. I mean, I think -- I think the Court came to
24 that conclusion because of the damning nature of the
25 recordings. As Ms. Armijo said, we don't have those

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1 in this case. So I think the Court should take a
2 different view; it's apples and oranges. If the
3 Court doesn't, and the Court would be inclined to
4 grant severance if we don't Brutonize the evidence,
5 then we do that. I mean, if it's an admission by a
6 party opponent --

7 THE COURT: The problem is -- I can't
8 say -- I don't know all the evidence. I can't say
9 right at the time what I was able to stay twice in
10 opinions on motions to sever earlier, that I was
11 unaware of any evidence that could not be used
12 against everybody.

13 And, as I went through the James hearings,
14 and we began to really look at some of the evidence,
15 I couldn't say that anymore. And so that was the
16 reason I began to say, Hey, I'm concerned. I don't
17 know if the jury can absorb all these limiting
18 instructions. I think it may get too confusing. And
19 began to think that I had to do something else.

20 MR. BECK: Right. And so what I'm saying
21 is that I think, if the Court is inclined to relook
22 at severance -- again, there is no recordings that we
23 would Brutonize, it would just be statements by a
24 witness up on the stand. So, if the Court doesn't --
25 I mean, if the Court finds that there are statements

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1 against penal interests that come in in this case,
2 those statements against penal interests would come
3 in against every defendant regardless whether it's
4 just Mr. Andrew Gallegos in trial, or if all of these
5 eight defendants in trial. So those are just like
6 the co-conspirator exception statements.

7 Now, it's different as the party opponent
8 statements. So when we don't have recordings, there
9 is nothing to Brutonize. If somebody is going to get
10 on that stand and say --

11 THE COURT: Why not just give it up?

12 MR. BECK: That's what I'm saying. I'm
13 saying we are giving it up. I'm saying I disagree
14 with the Court. But if push comes to shove, we're
15 giving that up and it's fine. If someone can't sit
16 on that stand and say, you know, Mr. Joe Gallegos
17 told me "I did it with the candlestick in the library
18 and, oh, by the way, Mr. Andrew Gallegos gave me that
19 candlestick yesterday," I mean, if that statement is
20 only coming in against Mr. Joe Gallegos, then it's
21 not relevant, you know. And certainly, you know --
22 don't hold me to this, but it seems to me, that if I
23 were sitting in the chair up there, in the robe, I
24 would say substantial prejudice, the danger of unfair
25 prejudice substantially outweighs the probative value

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1 of that statement for him.

2 So I think, when push comes to shove, we're
3 willing to give on those statements by party
4 opponents, because we'd rather just leave that out
5 than sever the trials.

6 THE COURT: Well, the co-conspirator
7 statements can certainly be used against the
8 co-conspirators.

9 MR. BECK: Right.

10 THE COURT: But they can't be used against
11 anyone else in the -- that's not part of that
12 conspiracy. So even though they may be part of the
13 SNM Gang, or they may be part of the enterprise, or
14 they just may be somebody in another conspiracy,
15 they're entitled to a limiting instruction on
16 co-conspirator evidence, but they can't be used
17 against anyone in the other conspiracies.

18 MR. BECK: Right.

19 THE COURT: Now, the thing we had in the
20 first trial that made that simpler is the Javier
21 Molina conspiracy was the big co-conspirator
22 statements, and so the bulk of those came in against
23 everybody.

24 MR. BECK: Right.

25 THE COURT: Whereas, the conspiracies that

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1 Mr. Baca had on the other three counts, and two that
2 went to the jury, were fairly limited. And I think
3 we did give limiting instructions as to those
4 co-conspirator statements as to the other three
5 defendants. I think the other three defendants were
6 fairly vigilant in asking for limiting instructions
7 on that.

8 Here, on the other hand, we're going to
9 have six conspiracies; five conspiracies that are
10 indicted. Is it really possible to give limiting
11 instructions that are going to be able to be followed
12 given that some of these statements can't be used,
13 these conspiracies can't be used against other
14 people?

15 MR. BECK: Sure. I think it's just like
16 the Marcantel and Santistevan case.

17 THE COURT: Those ended up -- I know
18 everybody thought that was going to be the dog
19 wagging the tail. But it turned out to be the tail,
20 as far as evidentiary issues were concerned.

21 MR. BECK: Right. And I think it's the
22 same thing in this case. I mean, when we have these
23 co-conspirators giving the statements about Burns, I
24 think a limiting instruction is appropriate to give
25 against everyone else. And it's not going to make --

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1 THE COURT: It just seems to me it's going
2 to multiply the number of limiting instructions that
3 are going to have to be given, much more than what we
4 had in Trial 1.

5 MR. BECK: I don't think so. I don't think
6 there is as many statements coming in in this case,
7 because we don't have those recordings. Given the
8 number of conspiracies and separate conspiracies, it
9 may be close to that number. But I don't think it
10 will be more, because with the recordings we had, you
11 know, instructions before and after each different
12 clip that was played. And as the Court heard, I
13 mean, the jury got those instructions. They'll get
14 them here.

15 When you hear evidence about, you know, the
16 Burns case, for example, and it only involves two
17 people out of eight, there is not really anything to
18 Brutonize or any prejudice, because it doesn't
19 involve the other six people in the room.

20 THE COURT: All right. Let's do this:
21 Let's take a recess for about 15 minutes. Let me let
22 Ms. Bean rest her fingers, and I'll come back in and
23 hear you, Ms. Armijo.

24 One of the things I need to know by the end
25 of the day -- I'm going to have to shift from Trial 1

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1 to Trial 2, so -- I owe a bunch of work in Trial 1,
2 but I've got to start focusing on you guys. Would
3 y'all sort of think -- the Government get together,
4 the defendants get together. If there is things that
5 we've argued in the past that you want opinions on,
6 rulings on, or something like that, or if there is
7 something here you want an opinion, an order, more
8 thought-out analysis sooner rather than later, tell
9 me, so I know kind of what to work on. I'd like to
10 start shifting to your case, rather than the other.
11 I got plenty of time to work on their case. So let
12 me help y'all get ready for trial.

13 So think about that and as soon as we're --
14 maybe by the end of the day try to give that, so I
15 can walk out of here knowing exactly what you want to
16 work on. All right. 15 minutes, we'll be back.

17 (The Court stood in recess.)

18 THE COURT: All right. Let's go on the
19 record. Everybody look around, make sure every
20 defendant has an attorney. Looks to me like they do.

21 All right. So Ms. Armijo, Mr. Beck, do
22 y'all have anything further on the motion to sever
23 you want to say?

24 MS. ARMIJO: Your Honor, not as to the
25 statements. I will just address some of the other

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1 issues.

2 This case does involve four murders, but
3 only two occurred in 2001; the other occurred in
4 2007; and then, of course, the Burns in 2012. Even
5 the trial that we just had, which is the Javier
6 Molina case that happened in 2014, we had testimony
7 about the 2001 murders, and we had testimony about
8 the 2007 murders. So the Court is correct, in that
9 we would be showing a continuum of racketeering
10 activity throughout it.

11 This case is different from the Larry Lujan
12 case, not only that it's not racketeering, but it's
13 not a death penalty case either. Larry Lujan was
14 facing the death penalty. And that was one of the
15 Court's primary concerns in that case as to the
16 co-defendant.

17 We do have, in this case, plenty as to
18 Andrew Gallegos. As the Court knows --

19 THE COURT: Let me ask, on Mr. Andrew
20 Gallegos, are y'all going to try to establish that he
21 is an SNM Gang member?

22 MS. ARMIJO: That's exactly where I was
23 going. As you know, with Daniel Sanchez, he was only
24 suspected, not validated. And I believe that Andrew
25 Gallegos is only suspected in the State system. But

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1 we do have a witness that would say that Andrew was a
2 validated SNM Gang member when he went to federal
3 prison.

4 He was prosecuted federally, which is
5 important in a wiretap case that involved his
6 brother, Frank Gallegos, who the Court may recall
7 testimony; Frank Gallegos is an SNM member in the
8 federal system. And so he was -- and one of his bad
9 acts, when we get to bad acts, is actually with his
10 brother as well. So we will be saying that he is a
11 member.

12 I'm sorry, Your Honor, I was distracted
13 with noise behind me. We will have testimony that he
14 was --

15 THE COURT: So your theory is he's an SNM
16 Gang member?

17 MS. ARMIJO: That is our theory. And he is
18 suspected. But, as you know, we only have to prove
19 associate. But we will be saying he is an SNM Gang
20 member. And we certainly have plenty of evidence
21 that he was a street gang member, which is a feeder
22 gang to the SNM. So we have plenty of gang evidence
23 as to Mr. Andrew Gallegos. And I believe that's it,
24 Your Honor.

25 THE COURT: Okay. Thank you, Ms. Armijo.

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1 Before I hear from Ms. Torraco or
2 Mr. Roberts, again, anybody else want to say anything
3 on this motion? Mr. Castle?

4 MR. CASTLE: Yes, Your Honor. Regarding
5 this concept of Brutonizing, there is really three
6 kinds of statements, categories of statements, that I
7 think the Government is going to be seeking to admit.
8 One is co-conspirators, and we're going to be dealing
9 with that through the James.

10 The second is admissions by a party
11 opponent. And I think the Court, in its previous
12 order, read that as what that party is admitting
13 about itself, not necessarily other people.

14 But there is the third category that is the
15 subject of the Government's motion in limine, which
16 is the statements against interests. If they're not
17 going to agree to categorically Brutonize those
18 statements, there is numerous statements where people
19 say -- 10 years after the murders -- say that one of
20 these defendants admitted to involvement, and he
21 implicated somebody else. And so if that's the case,
22 then, we're going to need to litigate it -- I mean,
23 statement by statement. I know it's kind of almost
24 ironic -- it might shock the Court a little bit. But
25 I think we had kind of a cowabunga moment, when I

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1 looked at Mr. Beck's motion about that, and he said:
2 You have to deal with it one by one. I think that is
3 what the alternative is going to be. If we have to
4 do -- we have to go through it one by one, and we
5 have --

6 THE COURT: Well, like I said, it's been
7 hard for me to focus today on a motion that just came
8 rolling in. But what I think Mr. Beck is saying --
9 and everybody can tell me if it's not -- with Mr.
10 Perez I made some decisions that, because of him
11 being on this stand, we all witnessed it, which he
12 was saying: I just said those things to try to
13 protect myself, that's not what I meant. I did the
14 opposite, it was hard for me to say that was
15 irrational and provides context so that it satisfied
16 all the prongs of the statement against interest, and
17 so said that it couldn't be used against him.

18 What I understand Mr. Beck to be saying
19 here is, Judge, you gave it an individualized look
20 with Mr. Perez; you've got to do the same thing here.
21 You can't just throw them all out. And I think
22 that's fair. I mean, I don't really know what the
23 statements are the Government is going to try to use.
24 But it seems to me that it worked for Mr. Perez for
25 me to make that call. And I think it was a good

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1 call. It may work to your advantage, it may work for
2 the Government's. I don't know. I don't know the
3 statements well enough. Is he saying more than that?

4 MR. CASTLE: I was hoping he was going to
5 say more than that, Your Honor. I mean, I think when
6 it comes to a statement against interests, it has to
7 be against that person's interests.

8 THE COURT: Well, let's see if that's the
9 case. Show me --

10 MR. CASTLE: It's 804(3)(a), it says, "A
11 reasonable person in the declarant's position would
12 have made the statement."

13 THE COURT: But I don't think -- and you're
14 welcome to educate me on this -- I don't think that's
15 going to be limited as to the declarant.

16 MR. CASTLE: It says it is not only
17 contrary to the declarant's proprietary or
18 pecuniary --

19 THE COURT: Well, but once it's established
20 that it's not -- once it's established that it was
21 against the declarant's position, there is nothing
22 that limits its use against every one of the
23 defendants.

24 MR. CASTLE: I think where the Court is
25 going is the Smalls case. But at the end of the

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1 Smalls case, they remanded it back to see if
2 redaction was necessary, because portions of these
3 statements weren't against that particular person's
4 interests.

5 But what we're going to have to do -- I'll
6 let the Court know, because I anticipated that this
7 is what the Government wanted to do -- we've
8 subpoenaed these declarants in, and that's what we
9 had to do with Mr. Perez' statements, and put them
10 through the crucible of examination, to determine all
11 the circumstances surrounding it.

12 You know, I think that, ultimately, if the
13 Court were to allow it, then we're still dealing with
14 the same issue the Court had, which is you're still
15 going to have to do limiting instructions. I thought
16 that the Court's order said that it would allow it
17 in.

18 THE COURT: We never had any evidence in
19 the first trial come in under 803 -- 804(b)(3), that
20 I can remember.

21 MR. CASTLE: There was one statement
22 that -- at least it was in the Court's opinion, the
23 Court's opinion that it issued I think about a
24 week-and-a-half ago. One of them was listed as
25 804(b)(3). I don't know the circumstances, but

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1 that's what the Court ordered it was admissible
2 under. It may have been only admissible against that
3 individual, so it might not have been a litigated
4 statement in any kind of degree.

5 THE COURT: Probably if I said -- I don't
6 remember the statement -- if I said it was 804(b)(3),
7 it came in against everybody.

8 MR. CASTLE: I think that would be
9 problematic, because of the fact that we don't get
10 to, once again, to cross-examine, et cetera. I think
11 it has to be limited. I think that was what the
12 Court was indicating previously that it would issue a
13 limiting instruction to say --

14 THE COURT: Was it on one of the charts
15 that I said 804(b)(3)?

16 MR. CASTLE: Yes, it was the chart.

17 THE COURT: Did I say I'd give a limiting
18 instruction or not on that chart?

19 MR. CASTLE: I don't believe the Court
20 indicated -- well, I can't remember, Your Honor, to
21 be honest with you. It was the section where the
22 Court said that the parties hadn't litigated these
23 issues, but I'm making findings on these particular
24 statements. So I guess they didn't litigate it.

25 THE COURT: I'll just go back and look at

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1 them. Sometimes the parties can correct me -- or
2 here it's going to be the Government -- I have
3 decided a lot more issues that ended up evidence
4 coming in. So I can't even tell you now whether that
5 one came in. It may have been -- or it may have been
6 the defendants accepting my ruling. I don't know
7 which. We'll just have to go back and look.

8 But I guess the answer to your question,
9 right at the moment, I'm going to have to be
10 convinced that if it comes in on an 804(b)(3), that
11 it doesn't come in against all the defendants.

12 MR. CASTLE: Well, I think in this Court's
13 previous decisions -- and I'm trying to remember
14 which one -- it discussed the statement against
15 interest exception, and indicated that it wasn't just
16 all or nothing, you know, the statement -- the whole
17 statement doesn't come in necessarily. It's that
18 portion which is against the declarant's interest.

19 THE COURT: I think that would be true.

20 MR. CASTLE: So using the example of Andrew
21 and Joe, I think that Mr. Beck gave, which was, you
22 know, Joe is saying, yeah, I committed this murder,
23 and then, oh, by the way, Andrew helped me, I don't
24 know how that part about, "Oh, Andrew helped me," is
25 against his interests. In fact, it might be trying

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1 to share the blame with somebody else. And there is
2 case law that talks about that. Or shifting the
3 blame, or who knows what the basis of it is.

4 So if the Court is considering it, then
5 we're going to have to bring in -- luckily, we've
6 writted these folks, and subpoenaed them. But we're
7 going to have to litigate those under that
8 circumstance.

9 If the Government is going to make a
10 decision, I would hope that we could find out in the
11 next day if they're going to --

12 THE COURT: Well, it sounds like they're
13 not. I think you and I have to assume that the
14 agreement that they made in the first trial they did
15 for the tactical reasons of getting the two juries
16 off the table, and they didn't think they were giving
17 up anything, because it ended up -- I mean, this is
18 the thing that gives me some confidence in what we
19 did in the first trial -- not some, but a lot -- is
20 that we guessed correctly that a lot of the limiting
21 instructions were for evidence that it was very
22 difficult to figure out how it could be used against
23 anybody else.

24 And I guess that's -- this is more a
25 question or a comment more for Ms. Torraco. I guess

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1 I'm getting -- kind of convincing myself a little bit
2 that that's the situation here, that we're not going
3 to see a lot of evidence.

4 For example, take the conspiracy that we
5 have with Mr. Burns, which is the one that she's most
6 concerned about. I'm having a hard time figuring
7 out -- she's entitled to a limiting instruction that
8 you can't use the conspiracies against Mr. Castillo
9 and Mr. Garza, or Mr. Gomez, you can't use those
10 against her client. She's entitled to that. But how
11 would they use them anyway? I mean, they are so far
12 in time, and distant, I don't know how they would use
13 it.

14 MR. CASTLE: And I understand. I think --
15 I'm thinking more --

16 THE COURT: So she's entitled to a limiting
17 instruction, but the evidence -- the evidence is
18 not -- it would be hard for anybody to use it anyway.

19 MR. CASTLE: I'm thinking more in the
20 context of our counts, where in one count they say
21 there is 10 co-conspirators; another there is 11.
22 And in the context of not co-conspirator statements,
23 but statements against interests, you know, any one
24 of these people make some kind of a statement
25 implicating themselves, and then they decide to

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1 implicate someone else. I think there is going to be
2 a problem. And we're going to have to do a limiting
3 instruction. I'm not sure why we'd do a limiting
4 instruction when we could excise that out or redact
5 it, and --

6 THE COURT: Well, I can't force the
7 Government. I do have -- I can take it into
8 consideration in a motion to sever, but if they don't
9 want to give it up, I can't really force them to give
10 up good evidence.

11 MR. CASTLE: I actually think the Court
12 can. Under Smalls, the last part of Smalls says they
13 have to be remanded to see whether there was
14 redaction necessary.

15 THE COURT: But the Court has to make a
16 good determination, which I will, as to whether it
17 comes in under 804(b)(3).

18 MR. CASTLE: I understand.

19 THE COURT: If I make that decision, I'm
20 not sure I run into problems with Smalls; do you?
21 Because it doesn't look to me like the district court
22 did that going into the trial. It didn't do it.
23 That's the reason it had to get sent back. I agree
24 with you that it's got be a statement against
25 interests. Not one sentence in a 302, and the whole

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1 302 -- I know 302s aren't coming in, but it doesn't
2 open it up to everything the declarant said. So I
3 agree with you, I've got to scrutinize. And I think
4 I demonstrated that I was willing to do that in the
5 first trial. Because I did it on those recordings
6 and everything else.

7 One thing, looking at these charts, I don't
8 see an 804(b)(3) statement in the chart. There is an
9 803(3) statement. Now, I've been including state of
10 mind, we had that come up a handful of times. But
11 I'm not seeing an 804(b)(3). If you have one, just
12 tell me where it is, and I'll take a second look at
13 it. But again, I just don't think anything came in
14 under 804(b)(3). I do think some things came in
15 under 803(3), both orally -- I remember that -- and
16 then it also came up -- I think it was in the chart
17 once. Same issue. It's not a different issue, but
18 different exception.

19 Anything else, Mr. Castle?

20 MR. CASTLE: Well, I think you're right.
21 It was an 804(b)(2). I apologize. That was a
22 statement.

23 THE COURT: Yes, I did do an 804 -- I did
24 let a statement in under 804(b)(2).

25 MR. CASTLE: Well, Your Honor, I think it's

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1 still an open question whether the statement against
2 interests needs to be excised under the due process
3 concerns. And we've briefed that probably as much as
4 it can be briefed. And I think that's where the
5 Court's concern was finally in Trial 1, when it
6 thought about doing separate trials.

7 THE COURT: Well, I tell you it was just
8 the reality that I thought I was going to have to
9 give too many limiting instructions on testimony that
10 was going to come in under 801(d)(2)(A), the party
11 admissions, because of the number of tapes that we
12 were going to have. And I guess, taking the
13 Government at its word, they're just not going to
14 have that many statements.

15 I think one of the reasons they're
16 reluctant to give up, and do it like the first trial,
17 is because they can't think of any statements they're
18 giving up, but they don't want to give them up.
19 Under the first trial, they knew what they were
20 giving up. And they were willing to give it up,
21 because they knew they were going to get a limiting
22 instruction, they knew it couldn't be used against
23 anybody, so why not just Brutonize the very few
24 statements that were in there that mentioned somebody
25 else's name or something?

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1 MR. CASTLE: Your Honor, what
2 essentially -- how the Government is interpreting the
3 statements against interest exception is that it
4 broadens the co-conspirator exception. You no
5 longer -- if a co-conspirator makes an admission
6 outside the context of the conspiracy, now you get it
7 in under this other rule.

8 THE COURT: Like you say, you've read it
9 closer than I. If they're doing that, I have no
10 opinion on that. I'm a blank slate.

11 MR. CASTLE: I think that rules, the
12 authors of the rules of evidence, when they came up
13 with the co-conspirator exception, limited it to
14 statements within the context of the conspiracy, was
15 explicitly saying statements that co-conspirators
16 made outside the context of the conspiracy should not
17 come in. Otherwise, they wouldn't have that
18 limitation under 801.

19 And so, I think logically, when we look at
20 that, and look at the constraints of 804(b)(3), where
21 it says it has to be against the declarant's
22 interests, I think the answer might lie in combining
23 those two rules.

24 THE COURT: Your argument has force. I'll
25 have to take a look at it.

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1 MR. CASTLE: Okay.

2 THE COURT: All right. Anybody else want
3 to comment on this before I hear Ms. Torraco?

4 Ms. Torraco.

5 MS. TORRACO: Thank you, Your Honor.

6 I'm just going to ask that the Court review
7 the Gambino case, it's actually called Gallo, the
8 Gallo case, before you make a final decision.

9 Because I think that that case is rich with facts
10 that are really on point to this case.

11 I do want to bring to the attention of the
12 Court that the State did have jurisdiction over this
13 murder case, regarding Counts 4 and 5, and they did
14 choose to prosecute the case, and that was no billed,
15 as against Andrew and Joe Gallegos. The --

16 THE COURT: Was that the one that was no
17 billed, or was that the magistrate judge that
18 determined that -- it wasn't a Grand Jury, I thought
19 there was a magistrate judge or a district judge that
20 held a hearing and determined there was no probable
21 cause.

22 MS. TORRACO: Right, that's correct. For a
23 bindover. And I apologize, but I use the term no
24 bill consistently with he chose not to bind it over.
25 But it was a magistrate judge that heard the

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1 evidence. And then after that the DA's office closed
2 the case. The DA's office had the choice to then
3 take it to the Grand Jury if they thought the
4 magistrate was wrong, and made the improper decision.

5 But I do appreciate the Government making a
6 commitment to give us the statements. The last thing
7 I think any of us want is a mistrial or reversal on
8 appeal, which, while this Court is trying to be very
9 efficient in trying all of the defendants together,
10 the last thing that we want is a mistrial -- or I'm
11 sorry, a reversal on appeal, because there should
12 have been severance.

13 So I'm still asking for severance. I'm
14 still asking for you to wait until we have litigated
15 some, if not all of the statements. But I appreciate
16 the Government making a commitment. And I'm asking
17 the Court to hold them to that. We don't know all of
18 the statements that are going to come in. And the
19 last thing that we want is a statement coming in that
20 can't come in, and that this Court can't give a
21 limiting instruction after it is already brought into
22 evidence. And so part of this motion to sever comes
23 with it. What's the evidence?

24 I also want to point out that the
25 Government said there is plenty of evidence against

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1 my client, Mr. Andrew Gallegos, that he's a member of
2 SNM. If that is the case, that supports the argument
3 for severance, because what I think I heard was the
4 Court was concerned that we're going to spend just as
5 much time on one defendant as we would if we try four
6 defendants or five defendants or eight defendants.

7 However, if --

8 THE COURT: But like Ms. Armijo said, we
9 heard about your murders in the first case.

10 MS. TORRACO: Say that again. I'm sorry.

11 THE COURT: We heard about your murders in
12 the first case. So we're probably going to hear
13 about those other murders in this case. I mean,
14 that's the problem with severance. I and the
15 Government and the juries are going to hear the same
16 evidence in both cases.

17 MS. TORRACO: Why is that a problem?

18 THE COURT: Well, why sever then? What
19 efficiencies do we get out of severing if everybody
20 is going to hear the same evidence twice?

21 MS. TORRACO: Because the murders in this
22 case that are being litigated, and those are the
23 questions before the Court, are hearing all of
24 evidence as to Mr. Andrew Gallegos is a violation of
25 his due process rights. I know it's been litigated

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1 and the severances and the legal arguments have
2 already been done, but this defendant is in a very
3 different position than all of the other defendants.
4 And the Court earlier, with Ms. Armijo, said
5 something about, Well, I can give a limiting
6 instruction as to these other murders, that they
7 can't take those into consideration. But what's
8 going to happen is --

9 THE COURT: They can't use co-conspirator
10 statements in those other conspiracies. I'd have to
11 think -- I probably will not give a limiting
12 instruction on other murders. But it would be
13 co-conspirator statements cannot be used against
14 other defendants outside of the conspiracy.

15 MS. TORRACO: Yes, Your Honor. And I'm --

16 THE COURT: But at the same time, I guess
17 the reason I think that's a minimal, or I can
18 minimize any problem is I don't know how anybody
19 views the evidence of a 2001 murder against somebody
20 being charged with a 2007 murder.

21 MS. TORRACO: Because there is a common
22 co-defendant, and that's Joe Gallegos. That's how
23 they're going to use it against Andrew Gallegos,
24 because there is a common co-defendant. And that's
25 why I'm saying, if the Government is conceding that

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1 they already have sufficient evidence that he's an
2 SNM member, then there is no harm in trying him
3 separately. There is harm in trying him with Joe
4 Gallegos, because Joe Gallegos is the common
5 denominator amongst three of the four cases.
6 Especially, when some of those statements are Bruton
7 statements. And I would direct the Court to
8 statement number 46, which the declarant is Joe
9 Gallegos.

10 And my bigger concern is that when we
11 started the day, the Government conceded that, well,
12 there is other statements, and we're also going to
13 use the statements from Trial 1. And there is other
14 statements, and, you know, we're just now
15 interviewing people, and they might remember more
16 things.

17 And so the magnitude of the Bruton
18 statements we don't know right now. And I don't know
19 how many bench conferences -- I was one of the few
20 people that didn't get to watch any of the last
21 trial -- but the number of bench conferences and the
22 confusion to the jury and the potential for mistrial
23 is great.

24 THE COURT: All right. Anything else, Ms.
25 Torraco?

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1 MS. TORRACO: No. And I appreciate your
2 listening to me. Thank you, Your Honor.

3 THE COURT: All right. Well, I'm going to
4 orally deny the motion. I won't pick this up and
5 write an opinion on it or put an order in place. If
6 you want to pick it up and renew it, you can. But I
7 think I've plowed this ground a fair amount of times.
8 And probably every time I come back to it, it seems
9 to me it's the right thing to do.

10 So I'm going to deny the motion orally.
11 And because I've got some other things I'm going to
12 need to do, I won't pick it up and try to write an
13 opinion or order on it. But we won't plan on
14 severing it at the present time.

15 The next motion we have up -- we're almost
16 at 5:30, and I need to let everybody go -- will be
17 Mr. Garcia's joint motion to sever defendants based
18 on practical grounds. And so, unless somebody wants
19 to try to squeeze it in today, I suggest we take it
20 up tomorrow.

21 Does anybody have anything they'd like for
22 me to start moving to? Either things that we argued
23 in the fall, getting ready for this trial, anything
24 that Christopher Garcia had that you're joining here?
25 Is there things that we're going to be arguing this

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1 week, the 33 motions that we're arguing this week,
2 that you'd like me to start focusing on? What do you
3 need sooner, and what do you need the most from me so
4 I make sure I serve you the best?

5 Mr. Castle?

6 MR. CASTLE: Your Honor, first of all,
7 1743, we would rest on the record. We have no other
8 record.

9 THE COURT: Which is that?

10 MR. CASTLE: That's the motion to sever on
11 practicality grounds.

12 THE COURT: All right. You don't have
13 anything further on that? All right.

14 MR. CASTLE: I think the defense would
15 prefer that we start up with the James motions
16 tomorrow, and that the Government make their
17 presentation. And then the defense can decide to
18 cross or not to cross based on that.

19 THE COURT: Looking forward to the trial is
20 what you need the most is what I did for the
21 defendants in the first case, is that chart, kind of
22 on the James? Is that what's going to help you the
23 most?

24 MR. CASTLE: Yes. I think the
25 time-intensive matters that are left on this document

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1 is going to be James, motion to dismiss, and the
2 individual statements that people are going to raise
3 for Your Honor's consideration.

4 I think, based upon the majority of the
5 motion to dismiss was Mr. Garcia's motion. Mr. Troup
6 joined. I think, if we do that last, we get -- well,
7 based on some of the Court's indications on the
8 motion to dismiss, that seems like it might be better
9 as the last motion that we focus on. Get rid of the
10 vast majority of everything else.

11 THE COURT: Okay. So it sounds like the
12 thing I can work on the most that's going to help you
13 is start creating charts, and an opinion on the James
14 statements?

15 MR. CASTLE: Yes.

16 THE COURT: Does the Government have any
17 disagreement with that?

18 MS. ARMIJO: No.

19 THE COURT: Are all the other defendants
20 sort of in that boat, too? That would be the most
21 helpful to you, if I kick out a James opinion?

22 MR. BENJAMIN: James. And then we're going
23 to work on the bill of particulars, Your Honor. That
24 would be my order, yes.

25 THE COURT: All right. Let me ask the

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1 marshals. Is it 9:00 in the morning or is it 8:30?

2 A MARSHAL: We were able to have them up
3 here by 8:30 this morning, Your Honor. I believe we
4 could do that again. If you would just allow us a
5 little leeway.

6 THE COURT: Sure. Let's shoot for 8:30.
7 Does that work? So we'll see y'all at 8:30. And
8 we'll do the best we can to get everybody in here. I
9 appreciate the marshals' hard work. I appreciate
10 y'all's hard work.

11 Y'all have a good evening. See you at 8:30
12 in the morning.

13 (The Court stood in recess.)

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3 UNITED STATES OF AMERICA
4 DISTRICT OF NEW MEXICO
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6
7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
8 Official Court Reporter for the State of New Mexico,
9 do hereby certify that the foregoing pages constitute
10 a true transcript of proceedings had before the said
11 Court, held in the District of New Mexico, in the
12 matter therein stated.

13 In testimony whereof, I have hereunto set my
14 hand on March 20, 2018.

15
16
17
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